Supreme Court, U.S.
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No. ___

IN THE
Supreme Court of the United States
October Term 2000

COUNTY OF ERIE, PENNSYLVANIA,
Petitioner,

v.

ERIE COUNTY RETIREES ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, cover retirees so that a violation of the statute occurs when an employer decides after employees retiree to provide disparate health benefits based upon Medicare eligibility?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals, Third Circuit, were Erie County Retirees Association, Lyman A. Cohen, for himself and all others similarly situated, and the County of Erie, Pennsylvania.

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PETITION FOR WRIT OF CERTIORARI

The County of Erie, Pennsylvania petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is reported at 220 F.3d 193. The District Court's opinion is reported at 91 F. Supp. 2d 860 (App., *infra*, 51a).

JURISDICTION

The court of appeals entered its judgment on August 1, 2000. A petition for rehearing and suggestion for rehearing en banc was denied by the court of appeals on September 6,

2000 (App., *infra*, 91a), and is unreported. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Relevant portions of the Age Discrimination in Employment Act of 1967, as amended by the Older Workers Benefit Protection Act, 29 U.S.C.A. §§ 621-634, are reproduced in Petitioner's Appendix, *infra*, at 93a.

STATEMENT

This action arises out of changes to the medical coverage provided by the County of Erie, Pennsylvania ("the County") to its retirees over age 65 eligible for Medicare. Beginning in 1972, the County instituted a program whereby persons employed by the County for at least eight years would be entitled to hospitalization insurance benefits during their retirement. The policy was a change from the County's previous practice of providing hospitalization benefits only to active employees. In 1987, the County began using Blue Cross/Blue Shield of Western Pennsylvania ("Blue Cross/Blue Shield") to provide coverage for three groups of people: (1) current employees, (2) Medicare-eligible retirees and (3) retirees not eligible for Medicare. All three groups received traditional indemnity insurance.

Faced with increasing health insurance costs, the Erie County Employees' Retirement Board (the "Board"), which administered the medical coverage for the County's retirees, decided on January 23, 1992 that employees hired after that date would not be eligible for continued health insurance benefits upon retirement.[1] In December 1995, the Board further restricted eligibility by declaring that persons the County hired prior to January 23, 1992 would remain eligible

[1] The Board is a named defendant in this action but did not participant as a party in the proceedings in the court below.

for retiree health benefits only if they fell into one of four groups: employees unable to continue their employment due to a disability and who otherwise were eligible for a disability retirement pension; employees who retired from the County government with at least 20 years of service and 55 years of age; employees involuntarily terminated from County government employment with at least eight years of service; and employees who retired from the County with at least eight years of service and 60 years of age. The plaintiff class in this action is composed of retirees who are aged 65 or older--and thus eligible for Medicare--who remain eligible for retiree health coverage under these restrictions.

In 1997, a change in government accounting standards prevented the County from continuing to use the "excess interest" generated by its pension funds to pay the premiums for retiree health coverage; instead, the County began to pay the premiums from its regular budget. That year, the County took over the Board's responsibility to select retiree health plans.

In the fall of 1997, pressure to reduce costs was enhanced when Blue Cross/Blue Shield announced that it would increase the County's premiums for medical insurance coverage by an average of 48%. Due to the increase in costs, the County restructured its retiree health plans. The County selected a Blue Cross/Blue Shield plan called "SecurityBlue" for its Medicare eligible retirees. SecurityBlue provides coverage through a Health Maintenance Organization ("HMO") that would require retirees to continue to pay Medicare Part B Medical Insurance premiums. Effective February 1, 1998, the County required all former County employees qualified for SecurityBlue to accept that program or lose all health coverage.

The County selected another Blue Cross/Blue Shield plan, "SelectBlue," for its retirees who were not eligible for Medicare and therefore not eligible for SecurityBlue.

SelectBlue is a point-of-service plan that combines the features of an HMO and a traditional indemnity plan. It placed those retirees in SelectBlue effective October 1, 1998. Under SelectBlue, participants had the option to receive care through a managed care system of providers or through physicians of their own choice. Retirees who did not qualify for either SecurityBlue or SelectBlue because they did not reside within the western Pennsylvania service area were offered traditional indemnity health insurance by the County.

Because SecurityBlue did not offer the "self-referral" option available under SelectBlue, the SecurityBlue retirees sued the County and the Board in September 1998, asserting that this difference in treatment from February 1998 forward vis-a-vis both current employees and non-Medicare-eligible retirees and their required payment of Medicare premiums violated the Age Discrimination in Employment Act ("ADEA") and state law.

The district court certified the class as an opt-in class action in February 1999. The County and plaintiffs then filed cross-motions for summary judgment on the plaintiffs' ADEA claims. Plaintiffs did not seek summary judgment on the claim that they were treated less favorably than current employees; rather, they compared themselves only to retirees not eligible for Medicare. The district court granted partial summary judgment to the County, concluding that "the ADEA clearly was not intended to apply to retirees . . . who premise their complaint on alleged disparities in the retirement health benefits based on Medicare-eligibility." (App., *infra*, 89a).

Following the grant of partial summary judgment to the County, the plaintiffs withdrew any claim that they had *vis-a-vis* current employees. The district court then declined to exercise supplemental jurisdiction over the state law claims

and dismissed those claims without prejudice.[2] The plaintiffs appealed.

On August 1, 2000, a panel of the Third Circuit reversed the district court's order for partial summary judgment, holding that plaintiffs had established a claim under the ADEA, and remanded the case to the district court to determine whether the County can satisfy the safe harbor contained in 29 U.S.C. § 623(f)(2)(B)(i).[3]

REASONS FOR GRANTING THE PETITION

The court of appeals below mistakenly held that retirees are covered under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, and that the ADEA prohibits employers from providing disparate health benefits to its retirees based on Medicare eligibility. Its ruling threatens serious harm to current and future retirees because it encourages employers to reduce or eliminate health benefits for all retirees provided by their former employers. The court of appeal's ruling is contrary to the statutory language of the ADEA, the express goals of the ADEA, the ADEA's legislative history, and the public policy that private funding of health coverage for retirees should be encouraged. This important issue of statutory construction has not been, but should be, settled by this Court. Indeed, the Equal Employment Opportunity Commission ("EEOC") has recently announced in its Compliance Manual a broad nationwide principle based on the decision below that "there is no provision in the ADEA permitting an employer to treat

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[2] A majority of the panel, over a dissent by Judge Shadur, held that the district court decision was a final order subject to an appeal even though the district court dismissed the pendent state claims without prejudice. Judge Shadur's dissent did not address the merits.

[3] The Third Circuit has directed the district court on remand to consider the factual issue of whether the County can satisfy the "equal benefit" safe harbor recognized in 29 C.F.R. § 1625.10.

retirees differently with respect to health benefits based on Medicare eligibility" other than the equal cost or equal benefit defense. EEOC Compliance Manual No. 915.003 at ch. 3, § IV.B (Oct. 3, 2000).

THE COURT OF APPEALS' DECISION RAISES AN IMPORTANT QUESTION OF STATUTORY CONSTRUCTION THAT PROFOUNDLY AFFECTS THE ABILITY OF RETIREES TO RECEIVE HEALTH BENEFITS.

1. The statutory prohibition against age discrimination contained in Section 623(a) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, uses the term "individual," *i.e.*, to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." The court below held that the term "individual" as used in the ADEA includes a "retiree"[4] in conjunction with its holding that an employer violates the ADEA when it offers its Medicare-eligible retirees health insurance coverage inferior to retired employees not eligible for Medicare. (*See* App.,

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[4] The ADEA does not define "retiree." The term "retirees" appears in Section 623(l)(2)(D) which deals with the computation and deduction of the value of retiree health benefits from a severance payment in conjunction with a layoff. *See infra* at 19-21. This severance deduction is made while the "individual" (the term used in the statutory provision) is a current employee, not after the individual has left the employer's workforce, *i.e.*, a retiree. Section 623(l)(2)(F) provides a cause of action for specific performance for such payment if the employer subsequently fails to fulfill its obligation to a retiree with regard to that health benefit. This provision for a unique cause of action demonstrates that Congress knew when it had to provide a special cause of action for retirees where none otherwise existed. Moreover, Section 623(l)(2)(D) states that the term "retiree health benefits" is used "For the purposes of this paragraph and solely in order to make the deduction authorized under this paragraph . . . ." This specification is further evidence that coverage for retiree health benefits was limited to a *single* circumstance with respect to a setoff for severance benefits.

infra, at 32a-38a) The ADEA does not contain a definition of the term "individual" so that a reviewing court can determine in a "plain and unambiguous" manner whether a "retiree" comes within that term and is covered by the statute. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). Accordingly to make that determination, "reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole" must be examined to decide the "plainness or ambiguity" of the statutory language in question. *Id.* at 341. A textual reading of the statute in conjunction with an understanding of its context indicates that Congress did not intend "retirees" to be included within the term "individual." The legislative history as well is consistent with this textual reading of the statute.

The broad, generic meaning of the term "individual" is of no help to the plaintiffs. This Court in *Robinson* stated that:

> To be sure "individual" is a broader term than "employee" and would facially seem to cover a former employee. But it would also encompass a present employee as well as other persons who have never had an employment relationship with the employer at issue. The term "individual," therefore does not seem designed to capture former employees, as distinct from current employees, and its use provides no insight into whether the term "employees" is limited only to current employees.

Id. at 345. Similarly, Section 630(l) defines "compensation, term, conditions, or privileges of employment" to encompass "*employee* benefits." The words "compensation, terms, conditions, or privileges of employment" that appear in Section 623(a)'s prohibition against age discrimination and are defined thereafter in the statute as "employee benefits" do not support plaintiffs' position that a "retiree" is included within the term "individual." This plain language means benefits granted to a person while they are an employee, not

benefits granted to a person when they are already a retiree. The definition of "compensation, terms, conditions, or privileges of employment" is phrased in terms of "employee benefits" not benefits to retirees.

This confusion over what the term "individual" encompasses is also not cured by reference to the statutory definition of "employee" appearing in Section 630(f) which refers back to the term "individual": "the term 'employee' means an individual employed by any employer . . . ." A retired person is not employed by an employer. While this Court in *Robinson* previously construed "employee" in the context of Title VII's anti-retaliation provision to encompass "former employees," that decision provides no guidance here because the term "employee" is not used in either Sections 623(a) with respect to the meaning of "individual" or 623(f)(2)(B)(i) with respect to the meaning of "older" or "younger workers."

Moreover, the Court in *Robinson*, to determine whether to read the term "employee" broadly in the context of Title VII's anti-retaliation provision, looked at the "primary purpose" of that provision: "Maintaining unfettered access to statutory remedial mechanisms." *Id.* at 345. By contrast, the express purposes of the ADEA are "to *promote employment* of older persons based on their ability" and "to prohibit arbitrary age discrimination *in* employment." 29 U.S.C. § 621(b) (emphasis added). Thus, while a broad reading of "employee" may have been appropriate to effectuate the purpose of Title VII's anti-retaliation provision, especially where the term is used in the statutory provision in question, such a reading is not consistent with the express purposes of the ADEA. *See infra* at 10. Thus, a retired person has no *employment relationship* with his employer, and the employer is therefore free to make distinctions amongst those persons without violating the ADEA. *See* § 623(f)(2)(A).

The next place to look to determine whether plainness or ambiguity exists, according to the Court's direction in *Robinson,* would be to examine the "specific context in which the language is used. . . ." That cannot occur here with regard to "retiree" because that term is not used in the relevant statutory sections, *i.e.*, Sections 623(a) or 623(f)(2)(B)(i), nor is the term "employee" used. Even if other sections of the ADEA, which do not contain the term "employee", are examined in the search for context, there can be no certain answer which would resolve the dispute in this case.[5] This Court in *Robinson* further stated that in its examination of the term "employee" it did not find that the term had the same meaning in all sections of Title VII. 519 U.S. at 343-44. This, said the Court, indicates that the term is ambiguous and therefore "each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute." *Id.* This is likewise true in the ADEA where the term "employee" in certain sections unambiguously refers to current employees. *See* Sections 623 (a)(2), 623 (a)(3), and 623(c)(2) as examples.

The court below held that the term "employee benefits" as used in Section 630(l) is broad enough to encompass retiree health benefits, citing *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1079 (1983). That case, as the court below recognized, dealt with decisions made about retirement plans while the employees were *current* employees. (App., *infra*, 30a) That is not the case here. The decisions about the choice of health plans for the County's retirees was made by the County *after* the retirees had left the County's employ. To bridge this crucial gap in reasoning, the court below adopted the EEOC's proposition that it would be anomalous that a decision, unlawful prior to the employee leaving the employer's workforce, becomes somehow lawful one day

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[5] "Retiree," likewise is not defined in the ADEA. *See, supra,* n. 4.

later when the employee is now retired. (*Id.* at 31a.) That result-oriented approach, not drawn from any reference to the statutory language, should be disregarded, especially given the conflicts in the legislative history.

The broader context of the statute as a whole -- the third area identified by this Court in *Robinson* to determine whether a statutory term is plain or ambiguous -- shows that the Older Workers Benefit Protection Act of 1990 ("OWBPA"), Pub. L. 101-433, 104 Stat. 978 (codified as amended in scattered sections of 29 U.S.C. §§ 623, 626, 628, 630 (1994)), which amended, *inter alia*, Section 623(f)(2) of the ADEA, was aimed at prohibiting employee benefit discrimination that might discourage older workers from remaining in the workforce or punish older workers who remained in the workforce. *See, supra,* at 8. See also Section 621 of the ADEA which states *inter alia*: "The Congress hereby finds that in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment . . . . It is therefore the purpose of this chapter to promote the employment of older persons . . . ." Likewise, Section 622 of the ADEA speaks in terms of "studies" about the "potential [of older workers] for continued employment," and that the Secretary of Labor shall undertake research "with a view to reducing barriers to the employment of older persons." This purpose of the ADEA was also recognized by this Court in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1973), where the Court stated that the passage of the ADEA "was prompted by its concern that older workers were being deprived of employment . . . ." 507 U.S. at 610.

Given that policy underlying the ADEA and especially the OWBPA, it is significant that the County's policy with regard to retirement health benefits did not discourage or punish the plaintiffs for remaining actively employed. To the contrary, the plaintiffs would have been better off had they continued

employment with the County because they would have remained eligible for health coverage under the County's traditional indemnity plan. Congress did not enact the Age Discrimination in Retirement Act.

Resolution of the issue of the plainness or ambiguity of the term "individual" in terms of whether it encompasses retirees can be resolved as well by looking at the broader context of the statute in question, as was done in the *Robinson* case, and by looking at the statute's legislative history. As noted above, the statutory purposes of the ADEA and OWBPA would not be served by the plaintiff's interpretation of the term "individual." Should plaintiffs be correct, then employers would attempt to comply with the equal benefit/equal cost exception by simply eliminating or severely reducing health benefits for *all* retirees. This illogical result, together with the avowed purposes of the ADEA and OWBPA, would indicate that Congress did not intend for retired persons to come within the ADEA's coverage.

Any arguable lack in clarity is also resolved by resort to the legislative history. The "Court has repeated with some frequency: 'Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.'" *Toibb v. Radloff*, 501 U.S. 145, 161 (1991) (quoting *Blum v. Stenson*, 465 U.S. 886, 896 (1984)). The legislative history of the OWBPA indicates that retirees were *not* intended to be covered. *See, e.g.*, 136 CONG. REC. 25,366 (1990) (colloquy between Senators Bentsen and Pryor: "The distinguished Senator is correct" that the ADEA "does not apply to retirees" and "applies only to employees and those individuals seeking employment"); 136 CONG. REC. 27,059 (1990) (Representative Clay during debates in the House of Representatives stated: "Since the ADEA covers only

employees and those individuals seeking employment, nothing in the bill would apply the provisions of the ADEA to retirees."); 136 CONG. REC. H8,621 (daily ed. Oct. 2, 1990) (On the floor of the House, Representative Goodling specifically acknowledged that the compromise "bill also clarified that employers are not required to provide equivalent retiree health coverage to Medicare-eligible retirees."); 136 CONG. REC. H8,628 (daily ed. Oct. 2. 1990) (Representative Clay stated that the ADEA protects employees whose "retiree health benefits are discriminatorily structured on age at the time of retirement.").

The regulatory history of the Tax Equity and Fiscal Responsibility Act ("TEFRA") of 1982, Pub. L. 97-248, 96 Stat. 324 (1982), similarly demonstrates that retirees were not intended to be covered under the ADEA in the context of a now-repealed ADEA provision concerning group health coverage. TEFRA added a provision, Section 4(g) (codified as 29 U.S.C. § 623(g)), which required group health coverage to be offered under the same conditions for employees aged 65 though 69 as any employee under age 65. This amendment essentially nullified the "equal cost/equal benefit" rule with respect to group health plans and instead created the more stringent requirement that employers offer health coverage under any group health plan on the same terms and conditions to all of their employees, regardless of age. *See* 48 Fed. Reg. 26435 (June 7, 1983) ("The overall intent of Section 4(g) [is] to relieve Medicare of the responsibility of providing primary health insurance coverage for the working elderly.").

The EEOC published interim regulations advising that "retirees would not be considered 'employees' covered by 29 U.S.C. § 623(g)." 48 Fed. Reg. 26434 (June 7, 1983). The EEOC further commented that:

> The issue has been presented concerning an employer's obligation to employees aged 65 through 69 who are at

> present not actively employed but who are receiving health benefits by virtue of extended coverage under an employer's health plan. In such a situation, the Commission will look to all the facts and circumstances to determine whether an employment situation still exists . . . *Retirees are not embraced by the term employee* and are, therefore, not covered by the literal wording of the new section . . . .

Id. at 26435 (emphasis added). Section 623(g) was later repealed in 1989. *See* Pub. L. 101-239, 103 Stat. 2233 (1989).

The EEOC's view now has changed. In the court below, the EEOC argued as an *amicus* that it would be anomalous to hold that an individual while employed could challenge a discriminatorily determined retiree health benefit, but could not do so one day later when that individual retired. (*See* App., *infra*, at 30a-31a.) The Third Circuit found this argument persuasive. (*Id.* at 31a.) Not only is the EEOC's present position inconsistent with its prior one, the EEOC's "one day later" argument fails to recognize that the Court of Appeal's ruling would permit an ADEA claim by a retiree against a former employer that he or she worked for twenty years ago.[6]

Thus, the legislative history of the OWBPA and the EEOC's failure to have a consistent interpretation of the term "employee" support the County's position that retirees were not intended to be covered within the term "individual" under

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[6] The EEOC's recent Compliance Manual cites to the court below's decision stating, "if an employer eliminates health coverage for retirees who are eligible for Medicare—or if it refuses to continue to cover its older retirees for the benefits it provides that are not offered by Medicare -- older retirees will get less coverage than younger retirees on the basis of their age. Unless the employer can meet the equal cost defense, the law does not permit this age discrimination." EEOC Compliance Manual No. 915.003 at ch. 3, § IV.B (Oct. 3, 2000).

the ADEA, and provide ample justification for reversal of the decision below.

2. Further textual analysis supports the County's view that the meaning of the term "individual" does not include retirees. The ADEA contains a statutory exception for discrimination in employee benefits in Section 623(f)(2)(B)(i) whereby an employer may justify age-based disparities in employee benefit plans based on the value or the cost of the benefit received. That subsection does not speak in terms of "individuals" but states that "[i]t shall not be unlawful for an employer . . . to observe the terms of a bona fide employee benefit plan where . . . the actual amount of payment made or cost incurred on behalf of an *older worker* is no less than that made or incurred on behalf of a *younger worker* . . . ." (emphasis added)[7] Thus, the statute on one hand prohibits discrimination against "individuals" but frames an exception in much narrower terms with regard to "older" and "younger workers." Plaintiffs here want to be "individuals" protected by the statute but not "older workers" subject to the statutory exception based on the value or cost of the benefit. Such an inherent statutory inconsistency is resolved by the simple fact that someone who is a "worker" must be currently *working* and not be a "retiree."

The legislative history of the OWBPA aids in interpreting the intent of Congress with respect to this subsection. As originally enacted, the ADEA provided a narrow exception under which it would not be unlawful for employers "to observe the terms of . . . any bona fide retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [the Act]." Age Discrimination in Employment Act of 1967, Pub. L. 90-202, § 4(f)(2), 81 Stat. 603 (codified at 29 U.S.C. § 623(f)(2) (1967)). Following the ADEA's enactment, the Department of Labor (which at that time had

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[7] The ADEA does not define "worker."

responsibility for enforcement of the ADEA) issued a regulation implementing § 4(f)(2). *See* 34 Fed. Reg. 9709 (June 21, 1969) (codified at 29 C.F.R. § 860.120(a)).[8] The regulation, which became known as the "equal benefit or equal cost" principle, provided that

> A retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

Id. Although the regulation underwent various permutations and responsibility for the implementation of the ADEA shifted to the EEOC, the "equal cost/ equal benefit rule" remained in effect as the basic interpretation of § 4(f)(2).

In 1989, this Court in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), rejected the EEOC's equal cost or equal benefit rule, finding the rule to be inconsistent with the plain language of the statute—namely, the word "subterfuge"—because the regulation did not appear to acknowledge a subjective intent element. 492 U.S. at 171-72.

Congress responded to the *Betts* decision by passing the OWBPA, which specifically overruled the result and reasoning of the *Betts* decision. Among other things, the OWBPA amended the definitional section of the ADEA to clarify that employee benefits are included within the definition of "compensation, terms, conditions, or privileges of employment." Pub. L. 101-433, § 102, 104 Stat. 978 (codified as 29 U.S.C. § 630(l)). Additionally, the OWBPA redrafted § 4(f)(2) of the ADEA by eliminating the

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[8] The regulation has since been recodified at 29 C.F.R. § 1625.10, and authority for its enforcement has been transferred to the EEOC.

"subterfuge" language and essentially adopting the EEOC's articulation of the "equal cost/equal benefit" rule. Pub. L. 101-433, § 103, 104 Stat. 978 (codified as 29 U.S.C. § 623(f)(2)).

The legislative history of the OWBPA strongly indicates that it was Congress' intent to continue to allow the practice of retiree health benefit integration with Medicare, which could result in disparate benefits to retirees.

When the Senate version of the bill that eventually became the OWBPA was originally reported in the Senate Labor and Human Resources Committee in April 1990, the Senate Report contained the following passage that is consistent with the decision of the court below:

> The Committee intends to approve the parallel practice of integrating retiree health benefits with Medicare, which is already permitted under the regulation. *See* 29 C.F.R. § 1625.10(e). The availability of Medicare benefits from the federal government will not justify a reduction in employer-provided retiree health benefits if the result is that, taking the employer-provided and government-provided benefits together, an older retiree is entitled to a lesser benefit of any type (including coverage for family and/or dependents) than a similarly situated younger retiree. *See id.*

S. REP. NO. 101-263, at 21-22 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1527.

The original version of S. 1511 and a nearly identical House Bill (H.R. 3200) were held off the floor because of opposition. For example, Senator Grassley raised the concern on the record that Senate Bill 1511 could "create havoc in the benefits area." 136 CONG. REC. 24,795 (1990). Senator Grassley entered into the record a number of "major questions" to be addressed by the sponsors of S. 1511, including the following:

> Some companies do provide health insurance coverage for retirees, but cease such insurance coverage when the retiree becomes eligible for Medicare. Thus some companies would be spending more for their youngest retirees, who are not eligible for Medicare, than for their older retirees, who are receiving Medicare.
>
> If the bill is enacted, would such a company be in violation of the law? Is that the sponsors [sic] intention? If not what provision in the bill protects employers in such circumstances?

Id.

Senator Grassley's concern was subsequently addressed during the course of proceedings held on September 24, 1990, when the Senate voted to pass an amended, compromise version of S. 1511. Specifically, one of the express compromise points was the decision to use "worker" in § 4(f)(2)(B)(i) of the ADEA, rather than the term "individual." 136 CONG. REC. 25,355 (1990) (Ex. 1, "Summary of Pryor-Hatch-Metzenbaum-Heinz Agreement on Betts Legislation" at ¶ 8).

The "Statement of Managers," which accompanied the final substitute bill, sought to clarify and eliminate the existing controversy concerning the reduction of retiree medical benefits at Medicare-eligible age:

> Many employer-sponsored retiree medical plans provide medical coverage for retirees only until the retiree becomes eligible for Medicare. In many of these cases, where coverage is provided to retirees only until they attain Medicare eligibility, the value of the employer-provided retiree medical benefits exceeds the value of the retiree's Medicare benefits. Other employers provide medical coverage to retirees at a relatively high level until the retirees become eligible for Medicare and at a lower level thereafter. *In many of*

> *these cases, the value of the medical benefits that the retiree receives before becoming eligible for Medicare exceeds the total value of the retiree's Medicare benefits and the medical benefits that the employer provides after the retiree attains Medicare eligibility. These practices are not prohibited by this substitute.* Similarly, nothing in this substitute should be construed as authorizing a claim on behalf of a retiree on the basis that the actuarial value of employer-provided health benefits available to that retiree not yet eligible for Medicare is less than the actuarial value of the same benefits available to a younger retiree.

136 CONG. REC. 25,353 (1990) (emphasis added).

Senator Orinn Hatch explained that the compromise was intended to protect retired persons by avoiding the creation of a regulation that might discourage employers from offering health benefits to their retirees:

> Many employers continue health benefits for persons who retire before they are eligible for Medicare and/or continue certain benefits that are supplemental to Medicare.
>
> This is a positive practice which helps provide important protections for retirees.
>
> *This compromise ensures that the bill will not interfere with these important benefits that are vital to retirees of all ages.*
>
> * * *
>
> It has been our policy to encourage employers to provide generous employee benefits. Clearly, this objective is frustrated, if not defeated, if Congress enacts legislation that so heavily encumbers American companies that they must reduce or eliminate such benefits.

* * *

> We must be concerned about the impact on all employees of additional Federal requirements that unnecessarily complicate existing arrangements or that will shift a firm's resources from actual benefits into regulatory compliance or litigation.
>
> If an employer is forced to reduce or eliminate benefits for some workers to avoid litigation exposure or to avoid going afoul of the law, we have to ask the question: Is it worth it?

136 CONG. REC. 25,356 (1990) (emphasis added). Thus, the relevant legislative history demonstrates Congress recognized and continued to sanction the practice of providing disparate health benefits for Medicare-eligible and non-Medicare-eligible retirees, thereby providing further evidence of Congress' intent that retirees are not covered by the ADEA.

3. The court below's interpretation § 4(a)(1) of the ADEA, as modified by the OWBPA, which prohibits an employer from reducing or eliminating health benefits for Medicare-eligible retirees without satisfying the "equal benefit or equal cost" standard of 29 C.F.R. §1625.10, creates a conflict between § 4(a)(1), and § 4(l)(2) of the ADEA, 29 U.S.C. § 623 (l)(2), also added to the ADEA as part of the OWBPA. Among other things, § 4(l)(2) allows employers, in the event of "a contingent event unrelated to age" (*i.e.*, layoffs or plant shutdowns), to offset an employer's severance pay obligations by the amounts of any retiree health benefits and/or "pension sweeteners" to which the employee might be entitled. See 29 U.S.C. § 623(l)(2)(A). *See also* 136 CONG. REC. 27,059-27,060 (1990) (discussing the operation of § 4(l)(2) in more detail). Notably, § 4(l)(2)(D) and (E) contemplate that an employer will be able to avail itself of this setoff even if the employer does not provide retiree health benefits to retirees over the age of 65. 29 U.S.C.

§§ 623(l)(2)(D), (E). Under § 4(l)(2)(D), an employer may claim a setoff of retiree health benefits against its severance pay obligations if it provides medical benefits to "retirees who are below age 65" or "retirees who are age 65 or above" or both classes of retirees. 29 U.S.C. § 623(l)(2)(D); *see also* 136 CONG. REC. H8,628 (daily ed. Oct. 2, 1990) (Representative Roukema: 623(l) "clarifies that in order to make a deduction for retiree health benefits from severance pay, an employer may have a retiree health plan that covers an employee prior to age 65 or after age 65; that an employer may have a health benefit that covers either age bracket or both age brackets, and still avail of the offset against severance.") (emphasis added); 136 CONG. REC. H8,628 (daily ed. Oct. 2, 1990) (Representative Goodling: The severance offset "provides that, in order to use the offset for retiree health benefits, an employer is not required to offer health benefits to both pre-Medicare eligible and post-Medicare eligible retirees. An employer may offer health benefits only to pre Medicare eligible retirees.") (emphasis added).

In other words, § 4(l)(2) of the ADEA recognizes that an employer need not offer retiree health benefits to Medicare-eligible retirees in order to take advantage of the setoff authorized by that section. In contrast, the interpretation of § 4(a) of the ADEA by the court below expressly prohibits the structuring of retiree health benefits as contemplated by § 4(l)(2). Under its decision, such plans are *per se* illegal under the ADEA. Contrary to that interpretation of the ADEA, Sections 4(l)(2)(D) and (E) of the Act expressly contemplate that employers will spend less on, and provide fewer medical benefits to, Medicare-eligible retirees than retirees who have not reached Medicare age. To qualify for the setoff for medical benefits provided to retirees who are younger than age 65, § 4(l)(2)(D) requires that "the package of benefits" offered by the employer be "at least comparable to benefits provided under [Medicare]." 29

U.S.C. § 623(l)(2)(D)(i). However, for retirees who are age 65 or older, the employer need only provide a benefit package "at least comparable to that offered under a plan that provides a benefit package with *one-fourth the value of benefits provided under [Medicare]*." 29 U.S.C. § 623(l)(2)(D)(ii) (emphasis added).

Similarly, where an employer's plan provides medical coverage to both Medicare-eligible and non-Medicare-eligible retirees, § 4(l)(2)(E) of the ADEA specifies setoff amounts significantly greater for coverage provided to retirees under the age of 65 than for retirees age 65 and older. These distinctions, completely consistent with the legislative history of the OWBPA, recognize that employers typically provide fewer medical benefits to Medicare-eligible retirees, and pay less for those benefits, than for non-Medicare-eligible retirees because most employer-provided medical plans for retirees are integrated with Medicare. Congress could not have intended employers to be able to benefit in the manner authorized by § 4(l) from the offering of retiree health benefit plans that, according to the analysis by the court below, would be unlawful under the ADEA. This conflict and the confusion and disruption of retiree health plans it has engendered further demonstrate the significance of the issue presented by this appeal and the appropriateness of review by this Court.

4. The court below erroneously concluded that the County violated the ADEA when it adopted a health insurance plan for retirees which made distinctions between two groups of retirees based in part on whether an individual retiree was eligible for Medicare benefits. The court below concluded this amounted to unlawful disparate treatment in violation of 29 U.S.C. Section 623(a)(1) because the County had treated such individuals differently "because of . . . age." This conclusion directly contravenes this Court's teachings in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

In *Hazen Paper*, the Court observed that passage of the ADEA "was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Id.* at 610. As a result, "[w]hen the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is." *Id.* at 611. Accordingly, "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." *Id.* at 609.

Here, the County's use of distinctions amongst retirees based in part on Medicare eligibility was motivated by "some feature other than the [the retiree's] age." While Medicare eligibility and age are closely correlated, they are not identical. Thus, although attainment of age 65 is generally a prerequisite for Medicare coverage, that is not always the case. In particular, individuals under the age of 65 would be Medicare eligible (and thus, as County retirees, required to elect SecurityBlue) if they had received Social Security or Railroad Retirement Board disability benefits for 24 months, or if they were a kidney dialysis or kidney transplant patient. 42 U.S.C. §§ 426(b), 426-1.[9] Similarly, retirees age 65 or older would not be Medicare eligible (and, thus, as County retirees, not required to elect SecurityBlue) if they had not worked for at least 10 years in Medicare-covered employment or if they were neither a citizen nor permanent resident of the United States. 42 U.S.C. § 402.[10] In other words, the status of

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[9] Indeed, the record below reflects that there were several retirees under the age of 65 who were placed in SecurityBlue because their disability (and not their age) qualified them for Medicare.

[10] Because the Country provided retiree health benefits to individuals terminated involuntarily after at least eight years of service, as well as individuals who retired from the county with at least eight years of service and 60 years of age, these exclusions from Medicare eligibility are not merely of theoretical import.

being Medicare eligible is both under and over inclusive of the status of being age 65: not all retirees age 65 or older were required to elect SecurityBlue and not all individuals required to elect SecurityBlue were age 65 or older.[11]

Accordingly, the court below was simply wrong in holding that "Medicare status is a direct proxy for age." Moreover, while the high correlation between age and Medicare eligibility might have significance under a disparate impact theory of discrimination, no such theory of liability was espoused in this case.[12] Further, based on this Court's teachings *in Hazen Paper*, such a correlation, without more, is insufficient to support a finding that an employer has engaged in *intentional* age discrimination.

The recent decision in *Dilla v. West*, 179 F.3d 1348 (11th Cir. 1999), is instructive in this regard. There, the district court found that the appellants were rejected for employment as air traffic controllers in favor of a younger applicant (Nolan) because (1) they would be eligible to retire much sooner than Nolan and (2) they had achieved a higher pay grade than Nolan in previous employment, and therefore would require a higher salary than Nolan in the air traffic

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[11] The Court of Appeals also sought to analyze the Medicare-eligible criteria in a vacuum, without reference to the additional criterion established by the County that the retiree must reside in the SecurityBlue service area (most of Western Pennsylvania). Those Medicare-eligible retirees who lived outside of that area were not required to select SecurityBlue but could instead elect traditional indemnity insurance. The effect of this was to create yet another group of retirees who, even though they were age 65 or older, were not required to elect SecurityBlue.

[12] The circuit courts disagree as to whether a disparate impact claim is permitted under the ADEA. *Compare Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007 (10th Cir. 1996) (ruling that disparate impact are not cognizable under the ADEA), *and, Dittrich v. Northwest Airlines, Inc.*, 168 F.3d 961, 966 (7th Cir. 1999) (same), *with MacPherson v. University of Montevallo*, 922 F.2d 766, 771 (11th Cir. 1991) (ruling that disparate impact are cognizable under the ADEA); *Katz v. Regents of the Univ. of Cal.*, 229 F.3d 831, 835 (9th Cir. 2000) (same).

controller position. The district court acknowledged that both of these factors were directly correlated with age-older workers who are generally closer to meeting federal retirement criteria and further advanced in their pay grade than younger workers. The district court, however, relying on *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1973), concluded that "the mere fact that there exists a perfect correlation, or even a direct link, between age and the factor purportedly relied upon by the employer does not perforce mean that the employer has impermissibly relied on age." *Dilla,* 4 F. Supp. 2d 1130, 1142-43 (M.D. Ala. 1998). Consequently, the district court ruled in favor of the defendant. The Court of Appeals affirmed, holding:

> Reliance on factors correlated with age does not by itself constitute age discrimination. To be sure, purported reliance on such factors may be a pretext for discrimination; if so, the defendant has violated the ADEA. *See id.* at 1142. The district court, however, concluded on the basis of substantial evidence that no such pretext was involved in this case.

Dilla, 179 F.3d at 1349.

There is not one shred of evidence in this case that the County sought to use Medicare eligibility as a pretext for intentional age discrimination. On the contrary, the evidence is undisputed that the County's motivation in using Medicare eligibility as a factor in allocating retiree health coverage was solely based on containing the costs of retiree health insurance so that it could continue to offer this benefit in some form to all retirees, regardless of their age.[13] The use of

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[13] Several courts have held that employers do not violate the ADEA when they discharge older employees because their salaries were higher than younger employees. *See, e.g., Allen v. Diebold, Inc.*, 33 F.3d 674, 679 (6th Cir. 1994); *DiCola v. SwissRe Holding (N. Am.), Inc.*, 996 F.3d 30, 33 (2d Cir. 1993); *Bay v. Times Mirror Magazines*, 936 F.2d 112, 117 (2d Cir. 1991).

this factor clearly did not rest on stereotypes, nor did it stigmatize older workers. Rather, "the prohibited stereotype ('Older employees are likely to be ___') would not have figured in [the County's] decision, and the attendant stigma would not ensue." *Hazen Paper*, 507 U.S. at 612. As such, "[t]he [County's] decision would not be the result of an inaccurate and denigrating generalization about age, but would rather represent an accurate judgment about the employee-that he indeed is [eligible for federal reimbursement of the majority of his medical expenses]." *Id.*

5. The decision below holds that § 4(a)(1) of the ADEA prevents employers who have provided some degree of health care coverage to their retirees from reducing or eliminating altogether that coverage once the retirees are eligible for Medicare. That holding is contrary to the long-held understanding of employers and regulators alike that the only restrictions current law places on an employer's provision of retiree health benefits are those found in the employer's benefit plan or other contractual arrangements. For example, 1998 Congressional testimony from the United States Government Accounting Office (GAO) contained the following statement:

> When an employer has terminated retiree health benefits, federal courts have turned to the nature of the written agreements and other pertinent evidence covering the provision of retiree benefits to determine the legitimacy of the action. In essence, the issues before the court are often a matter of contract interpretation. If the employer explicitly reserved the right in plan documents to modify health benefits, the courts have generally upheld the termination of coverage.[14]

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[14] *See e.g., Linville v. Teamsters Misc. & Indus. Workers Union, Local 284*, 206 F.3d 648 (6th Cir. 2000) (sustaining employer-provided retiree health plan that eliminates benefits when the retiree-participant reaches

U.S. Government Accounting Office, Testimony Before the Subcomm. on Oversight, House Committee on Ways and Mean, *Retiree Health Insurance: Erosion in Retiree Health Benefits Offered by Large Employers* 2-3 (GAO/T-HE-HS-98-110) ("GAO Report") (emphasis added).

Medicare eligibility is often the point at which employers reduce or eliminate retiree health coverage because such coverage is typically provided to allow early retirement and/or as a "bridge" to Medicare coverage. As the GAO reported in 1998, "early retirees are more likely than those who are Medicare-eligible to be offered health benefits by a former employer." (GAO Report at 4). Similarly, the American Association of Retired Persons (AARP) recently noted that reaching age 65 is "often a sharp transition point in health care coverage not only because it is the age of Medicare eligibility, but because employers may drop coverage for retirees once they become eligible for Medicare . . . ." AARP, *Health Coverage Among Persons Age 50 Through 64* (1998).

The statistical data compiled by the GAO and private organizations support these findings concerning the flexibility afforded to employers with regard to providing retirees health benefits. According to the GAO, in 1997, "only 31 percent of Medicare-eligible retirees were offered health benefits compared with 38 percent of early retirees." GAO Report at 4. In its year 2000 survey of employer health benefits, the Kaiser Family Foundation and Health Research Educational Trust found that, among all large employers (200 or more workers) offering retiree health benefits, 92% offered such benefits to early retirees, and only 67% to Medicare-eligible

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age 65); *International Union v. Skinner Engine Co.*, 188 F.3d 130 (3d Cir. 1999) (sustaining employer's termination of retirees' medical benefit plan that provided benefits to retirees up to age 65).

retirees.[15] Kaiser Family Foundation and Health Research and Educational Trust, *Employer Health Benefits 2000 Annual Survey* ("Kaiser Survey") at 140, 141 (2000). As reflected in the Kaiser Survey, the percentage of employers providing medical benefits to early retirees, but not to Medicare-eligible retirees varied somewhat by industry. Among state and local government employers, for example, 99% provided health benefits to early retirees in 2000, while only 73% of such employers provided those benefits to Medicare eligible retirees in that same year. *Id.* at 145. The disparity in the service sector was 94% to 59%; in the health care sector, 94% to 51%; and in the manufacturing sector, 83% to 59%. *Id.*[16] These statistics demonstrate that the finding regarding retiree health plans adopted by the Senate Managers in the legislative history of the OWBPA remains true today: "Many employer-sponsored medical plans provide medical coverage for retirees only until the retiree becomes eligible for Medicare . . . ." 136 CONG. REC. S13,597 (daily ed. Sept. 24, 1990).

These statistics further demonstrate the impact of the decision below beyond this case. The court below has interpreted the OWBPA in a manner that renders illegal all plans that terminate retiree medical benefits based on Medicare eligibility. In the health care industry, for example, over 43% of employer-sponsored retiree health plans terminate benefits when the retiree becomes eligible for

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[15] "Early retiree" means those persons retiring before age 65. *The Kaiser Family Foundation and Health Research and Educational Trust Employer Health Benefits 2000 Annual Survey* at 144 (2000) ("Kaiser Survey").

[16] Statistics are not currently available concerning the number of employers who, like the County, simply modify retiree health benefit plans based on Medicare eligibility.

Medicare.[17] Moreover, such statistics do not fully account for the significance of the decision in this case. In addition to retiree health plans that terminate benefits based upon Medicare eligibility, the decision also invalidates countless retiree health plans similar to the one offered by the County, that simply modify benefits to take advantage of cost savings provided by Medicare.

If the ruling below stands, affected plan sponsors will be forced to redesign their post-employment benefit packages either by (1) increasing benefits for Medicare-eligible retirees, (2) decreasing benefits for pre-Medicare retirees, or (3) eliminating retiree coverage altogether.[18] This uncertainty comes at a time of a general decline in the number of employers providing any retiree health benefits. The percentage of mid-size employers (200-999 workers) offering retiree health benefits, for example, is at its lowest level since 1993, down six percentage points from 1999 and 31 percentage points since 1988. Kaiser Survey at 140.

Given the steady rise in the cost of retiree health care, a significant number of employers may choose to comply with the ruling below by eliminating entirely retiree health benefits. Ironically, this is precisely the result that Congress sought to avoid in the compromise language of the OWBPA. *See, e.g.*, 136 CONG. REC. 25,356 (1990) (Senator Hatch: "It has been our policy to encourage employers to provide generous employee benefits."); 136 CONG. REC. S13,253 (daily ed. Sept. 17, 1990) (Senator Kassenbaum: "We should

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[17] This calculation is based on the Kaiser Survey's finding that while 94% of health care employers provide retiree medical coverage to early retirees, only 51% provide such coverage to Medicare eligible retirees.

[18] A survey conducted by Hewitt Associates found that while 56% of employers continue to provide post-65 health coverage for all or most of their retirees, 30% are considering terminating retiree coverage prospectively. Hewitt Associates LLC, *Health Care Expectations: Future Strategy and Direction* (Jan. 2000).

be encouraging employers to offer benefit programs to workers, not discouraging or eliminating popular and beneficial employee benefit programs."). Thus, Congress determined that prohibiting the practice of terminating or reducing retiree health care benefits based on Medicare eligibility would likely result in less retiree health care benefits, not more.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 4, 2000

APPENDIX A

UNITED STATES COURT OF APPEALS, THIRD CIRCUIT

No. 99-3877

ERIE COUNTY RETIREES ASSOCIATION and LYMAN H. COHEN, for himself and all others similarly situated,
Plaintiffs-Appellants,

v.

The COUNTY OF ERIE, PENNSYLVANIA
Defendant-Appellee.

Argued May 11, 2000

Filed Aug. 1, 2000

BEFORE: GREENBERG and McKEE, Circuit Judges, and SHADUR,* District Judge.

OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. INTRODUCTION

This matter comes on before this court on appeal from an order of the district court entered September 30, 1999, granting partial summary judgment in favor of the County of

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* Honorable Milton I. Shadur, Senior Judge of the United States District Court for the Northern District of Illinois, sitting by designation.

Erie, Pennsylvania (the "County"), dismissing appellants' claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* *See Erie County Retirees Ass'n v. County of Erie*, 91 F.Supp.2d 860 (W.D.Pa.1999) ("Erie County"). We are called upon to address the applicability of the ADEA when an employer offers its Medicare-eligible retirees health insurance coverage allegedly inferior to the coverage offered to retired employees not eligible for Medicare. The district court held that the ADEA did not apply in such circumstances. For the reasons set forth herein, we disagree, and accordingly will reverse and remand the case for further proceedings.

A. *Factual Background*

In 1972, the County implemented a policy pursuant to which it provided its retired employees with health and hospitalization insurance benefits during their retirement. In 1987, the County began utilizing Blue Cross/Blue Shield of Western Pennsylvania, now known as Highmark Blue Cross/Blue Shield ("Highmark"), to provide the coverage. The County classified employees and retirees into three main coverage groups: one for current employees, one for Medicare-eligible retirees, and one for retirees not eligible for Medicare. Each group had separate but similar traditional indemnity coverage. *Erie County*, 91 F.Supp.2d at 861-62; App. at 10.

Faced with increasing health insurance costs, the Erie County Employees' Retirement Board (the "Board"), which administered the medical coverage, decided that employees hired after January 23, 1992, would not be eligible for continued health insurance benefits upon retirement. On December 12, 1995, the Board further restricted eligibility by declaring that persons the County hired prior to January 23, 1992, would remain eligible only if they fell into one of four groups: employees unable to continue their employment due

to a disability and who otherwise were eligible for a disability retirement pension; employees who retired from the County government with at least 20 years of service and 55 years of age; employees involuntarily terminated from County government employment with at least eight years of service; and employees who retired from the County with at least eight years of service and 60 years of age. The plaintiff class in this action is composed of retirees who are aged 65 or older—and thus eligible for Medicare—who remain eligible for retiree health coverage under these restrictions. *Erie County*, 91 F.Supp.2d at 862-63; App. at 10.

In 1997, a change in government accounting standards prevented the County from continuing to use the "excess interest" generated by its pension funds to pay the premiums for retiree health coverage; instead, the County began to pay the premiums from its regular budget. That year, the County took over the Board's responsibility to select retiree health plans. In November 1997, pressure to reduce costs was enhanced when Highmark announced that it would increase the County's premiums for medical insurance coverage by an average of 48%. *Erie County*, 91 F.Supp.2d at 862-63.

In the fall of 1997, the County selected a plan called "SecurityBlue" for Medicare eligible retirees.[1] Effective February 1, 1998, the County required all former County employees qualified for SecurityBlue to accept that program or lose all health coverage. The district court described SecurityBlue as follows:

> SecurityBlue is a coordinated health care plan provided through Keystone Health Plan West, Inc., a federally qualified health maintenance organization ("HMO"), and

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[1] SecurityBlue is "[a] Highmark Blue Cross Blue Shield Medicare HMO from Keystone Health Plan West." Highmark and Keystone are independent licensees of the Blue Cross and Blue Shield Association. App. at 130.

> a contract with Medicare. SecurityBlue is available to persons who have Medicare Part B Medical Insurance and who live in the SecurityBlue 'service area' [which includes most of western Pennsylvania]. This Plan differs from a traditional indemnity plan primarily in that the health care needs of each member are coordinated by his or her primary care physician ("PCP"), who is selected from a list of physicians provided in the SecurityBlue Provider directory. The PCP is responsible not only for administering care, but also for making referrals to specialists and arranging for hospitalization. Some degree of individual choice is lost under this Plan inasmuch as a member's PCP must be selected from a list of physicians within the SecurityBlue network and coverage is available only for services provided or authorized by the insured's PCP. In most cases, the SecurityBlue Plan does not pay for services that are not authorized by the insured's PCP [with the exception of emergencies]. The trade-off for this loss of choice is that, unlike the traditional indemnity plan, the SecurityBlue Plan has no deductibles and little or no co-payment obligation; generally, 100 percent of the covered services are paid for. In addition, SecurityBlue covers pre-existing conditions without a waiting period and also provides benefits for some services—such as eye examinations, dental visits and hearing aids—that are not available under traditional indemnity plans or Highmark's SelectBlue point-of-service plan. . . . However, SecurityBlue members must continue to pay Medicare Part B Medical Insurance premiums.

Erie County, 91 F.Supp.2d at 863 (footnotes omitted).

The County selected a Highmark plan, "SelectBlue," for its former employees not Medicare-eligible and therefore not eligible for SecurityBlue. It placed those former employees

in SelectBlue effective October 1, 1998. The district court described SelectBlue as follows:

> The SelectBlue Plan differs from SecurityBlue in that it is a hybrid 'point-of-service' plan which combines the features of an HMO with those of a traditional indemnity plan. Under SelectBlue an insured can, for any health care incident, select either the HMO option (and accept its benefits and limitations) or the traditional indemnity option. In order to be eligible for SelectBlue, a retiree must be non-eligible for Medicare and must live in the SelectBlue service area [western Pennsylvania].

Erie County, 91 F.Supp.2d at 863.

Retirees who did not qualify for either SecurityBlue or SelectBlue because they did not reside within the western Pennsylvania service area were offered traditional indemnity health insurance.

Appellants contend that SecurityBlue provides inferior coverage as compared to SelectBlue and the traditional indemnity coverage previously available to them, but they largely focus their argument on the comparison between themselves and SelectBlue retirees. The gravamen of this lawsuit is that the County violated the ADEA by discriminatorily placing members of the plaintiff class into SecurityBlue on the basis of their having attained age 65.

B. *Procedural History*

The Erie County Retirees Association and Lyman H. Cohen, on behalf of himself and all other similarly situated retirees of the County age 65 or over placed in SecurityBlue, filed this action on September 18, 1998, against the County and the Board. Count I of the complaint alleged that the County violated the ADEA by treating members of the plaintiff class less favorably on account of their age, as compared to (1) active employees and (2) retirees under age

65. As the district court pointed out, the claim of unequal treatment as between members of the plaintiff class and retirees under age 65 encompassed two time periods: (a) February 1, 1998, to October 1, 1998, during which the County required members of the plaintiff class to accept SecurityBlue coverage while retirees under age 65 remained covered under the traditional indemnity insurance plan, and (b) October 1, 1998, forward, during which members of the plaintiff class remained in SecurityBlue while retirees under age 65 were placed in SelectBlue. *Erie County*, 91 F.Supp.2d at 863-64. Count II of the complaint alleged state law claims for breach of contract, equitable estoppel, and breach of fiduciary duty against the County and the Board. The complaint alleged that the defendants represented that an employee who retired after eight years with the County would be entitled to health care coverage "on the same terms that that person had received health care coverage from the County while employed." App. at 10. On February 10, 1999, the court certified the action as an opt-in class action. App. at 4, 13-18.

Appellants and the County then filed cross-motions for partial summary judgment on Count I. Appellants did not seek summary judgment with respect to the claim that they were treated less favorably than active employees, but only as to the claim that they were treated less favorably than retirees under age 65.[2] *Erie County*, 91 F.Supp.2d at 865. Appellants argued that the County violated section 4(a) of the ADEA, 29 U.S.C. § 623(a), by adopting a facially discriminatory health insurance program. *Erie County*, 91 F.Supp.2d at 864. Section 4(a) provides in pertinent part:

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[2] As indicated, Count I of the complaint asserted an ADEA claim against the County, while Count II asserted state law claims against both the County and the Board. The Board was not involved in the cross-motions for summary judgment, which related only to Count I.

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

Appellants further argued that the only affirmative defense, or "safe harbor," which might justify the County's discriminatory policy is that set forth in section 4(f)(2)(B)(i) of the ADEA, 29 U.S.C. § 623(f)(2)(B)(i), which provides:

> It shall not be unlawful for an employer—
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> * * * *
>
> (2) to take any action otherwise prohibited under subsection (a) . . . of this section—
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> * * * *
>
> (B) to observe the terms of a bona fide employee benefit plan—
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> (i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989).

The referenced regulation, 29 C.F.R. § 1625.10 (1989), established an "equal benefit or equal cost" standard under which an employer either must provide equal benefits to older and younger workers, or must incur the same costs on behalf

of older and younger workers. *See Auerbach v. Board of Educ. of the Harborfields Cent. Sch. Dist. of Greenlawn*, 136 F.3d 104, 111-12 (2d Cir.1998); *EEOC v. Massachusetts*, 77 F.3d 572, 573-74 (1st Cir.1996). The regulation provides in pertinent part:

> [B]enefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage.

29 C.F.R. § 1625.10(a)(1). Appellants argued that the County has not satisfied the equal benefit or equal cost standard because it is spending less for health coverage for retirees age 65 and over as compared to younger retirees while simultaneously providing the older retirees inferior coverage under SecurityBlue.[3] *Erie County*, 91 F.Supp.2d at 865.

The County argued that it based its decision to place Medicare-eligible retirees in SecurityBlue not on age but on three age-neutral factors: (1) active versus inactive employment status, (2) cost, and (3) availability of plans. Id. In the alternative, the County argued that it is entitled to the affirmative defense set forth in section 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1), which provides that it shall not be unlawful for an employer "to take any action otherwise prohibited under subsection[ ](a) . . . of this section . . . where the differentiation is based on reasonable factors other than age." The County further argued that the equal benefit or

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[3] The burden is on the employer to establish that its actions are lawful under the equal benefit or equal cost standard. *See* 29 U.S.C. § 623(f)(2).

equal cost standard under section 623(f)(2)(B)(i) has been satisfied.

The district court ruled on the motions in an opinion entered September 30, 1999. The court found that there were no disputed facts as to the nature of the County's policy regarding retiree health coverage:

> [I]t is undisputed that the triggering feature for SecurityBlue coverage was, and is, eligibility for Medicare Part B Medical Insurance, coupled with the proviso that the insured must reside in the SecurityBlue service area. While age is one factor that triggers eligibility for Medicare coverage, it is not the only one, because individuals may be eligible for Medicare if they are disabled. In fact, the record shows that at least some retirees under the age of 65 were placed in the SecurityBlue Plan on account of their disability, not their age. The County also notes that Medicare-eligible retirees residing outside of the SecurityBlue service area are not eligible for SecurityBlue, and therefore remain covered under the former traditional indemnity plan.
>
> We conclude that there is no genuinely disputed issue of fact as to the nature of the County's policy of providing health care benefits to its former employees. The undisputed evidence shows that former employees who were eligible for continuing health care coverage under the terms of the Retirement Board's December 12, 1995 resolution were offered coverage under the least expensive plan (that is, least expensive to the County) for which they qualified. Consequently, retirees who were Medicare-eligible were placed in SecurityBlue if they lived in the applicable service area. Those retirees who lived in the SelectBlue service area but who were not Medicare-eligible (either by virtue of age or disability) were placed in SelectBlue. Those retirees who did not qualify for SecurityBlue or SelectBlue (e.g.,

> those who maintain residence outside of Western Pennsylvania) were offered health insurance under the traditional indemnity plan.

Erie County, 91 F.Supp.2d at 865-66.

The district court held that "eligibility for Medicare is an age-based factor" and thus appellants had made a "prima facie showing of age-based discrimination." *Id.* at 868 & n. 11. The court reasoned as follows:

> Medicare eligibility and residency within the SecurityBlue service area are both necessary—i.e., 'but for'—conditions for receiving coverage under the SecurityBlue plan. To the Court's knowledge, none of the Plaintiffs are disabled so as to be independently eligible for Medicare on that basis. Rather, for the Plaintiffs, eligibility for Medicare followed ineluctably upon attaining age 65. Plaintiffs' age was a determinative factor in their placement in the SecurityBlue Plan because, if not for their age, they would not be placed in that plan. The non-age factor[ ] at issue in *Hazen [Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993)] . . . therefore, [is] distinguishable.

Erie County, 91 F.Supp.2d at 867.

Despite this conclusion, the court ultimately held that the County was entitled to a partial summary judgment because "the ADEA clearly was not intended to apply to retirees, like the Plaintiffs here, who premise their complaint on alleged disparities in their retirement health benefits based on Medicare-eligibility." *Id.* at 880. In so ruling, the court was influenced by indications in the legislative history of the Older Workers Benefit Protection Act ("OWBPA"), Pub.L. No. 101-433, 104 Stat. 978 (1990), that members of Congress viewed the ADEA as permitting employers to offer inferior health benefits to Medicare-eligible retirees. The court

rejected appellants' argument that the County could prevail only if it satisfied the equal benefit or equal cost standard under section 623(f)(2)(B)(i). Based on the presence of the term "older worker" in that provision, the court determined that Congress intended the equal benefit or equal cost standard to apply only with respect to benefits for *active employees*; accordingly, the court held that the County was entitled to judgment regardless of whether its health insurance scheme satisfied the equal benefit or equal cost standard.[4] *See Erie County*, 91 F.Supp.2d at 868-80.

In essence, it appears that the district court simply recognized an additional safe harbor for an employer who treats its Medicare-eligible retirees less favorably with respect to health benefits than other retirees—a safe harbor which does not require the employer to satisfy the equal benefit or equal cost standard. The district court's reasoning is illustrated by the following passage:

> Notably, § 4(f)(2)(B)(i) [of the ADEA] refers to 'older workers' and 'younger workers,' terms that, although undefined in the ADEA, suggest a more narrow and precise scope of protection. Congress did not use in § 4(f)(2)(B)(i) the broader term 'employees'. . . . Nor did Congress choose to employ the broader and more generic term 'individual' in § 4(f)(2)(B)(i). Cf. 29 U.S.C.A. § 623(a)(1).
>
> The statutory language thus seems to present somewhat of an anomaly. 'Individuals' are broadly protected against discrimination in terms of their employee benefits. However, employers may, consistent

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[4] The district court did not rule on the applicability of the "reasonable factors other than age" defense, but commented that "[i]n light of our conclusion that the Plaintiffs' eligibility for Medicare is an age- based factor, we would likely find this defense inapplicable as a matter of law." *Erie County*, 91 F.Supp.2d at 868 n. 11.

> with the equal cost/equal benefit principle, engage in limited forms of age-based discrimination as against '*older workers.*' *In order to succeed under the theory* they are advancing, Plaintiffs must be both 'individuals' and 'older workers'—terms which are not defined by thestatute. . . .
>
> * * * *
>
> We would reject any interpretation of the ADEA under which Plaintiffs would claim to be 'individuals'—and thus entitled to the broad protection of § 4(a)(1)—but not 'older workers' subject to the limited 'equal cost/equal benefit' defense of § 4(f)(2)(B)(i). Under such an interpretation, retirees like Plaintiffs would receive greater protection under the ADEA than active employees. This is a result which, in our view, could not have been intended under the Act.

Erie County, 91 F.Supp.2d at 869-70 & n. 14 (citation omitted).

Following the grant of partial summary judgment in favor of the County, appellants' counsel "represented on the record that the remainder of the ADEA claim [i.e. the claim that members of the plaintiff class have been treated less favorably than active employees] was being withdrawn." Mem. Order Dated Oct. 18, 1999, at 2. The district court, concluding that "all aspects of the ADEA [claim] have been adjudicated or otherwise withdrawn," declined to exercise jurisdiction over the state law claims in Count II, *id.*, and thus it dismissed the state law claims without prejudice and closed the case. Appellants now appeal from the grant of summary judgment. The sole substantive question before us is whether the district court erred in dismissing appellants' claim that the County violated the ADEA by treating them less favorably than retirees under age 65 with respect to health coverage.

II. JURISDICTION

The district court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1367. The matter of our jurisdiction to hear this appeal under 28 U.S.C. § 1291 requires more detailed discussion.

According to appellants' brief, they withdrew the remaining portion of their ADEA claim before the district court "without prejudice." *See* appellants' br. at 6. Moreover, the district court dismissed the action on that basis. Of course, ordinarily we do not have jurisdiction under 28 U.S.C. § 1291 of an appeal from an order partially adjudicating a case when an appellant has asserted a claim in the district court which it has withdrawn or dismissed without prejudice. *See Nyhuis v. Reno*, 204 F.3d 65, 68 n. 2 (3d Cir.2000); *West v. Macht*, 197 F.3d 1185, 1187-90 (7th Cir.1999); *Bhatla v. U.S. Capital Corp.*, 990 F.2d 780, 786 (3d Cir.1993). Accordingly, we requested the parties to submit memoranda with respect to our jurisdiction. The appellants responded as follows:

> To eliminate any possible confusion, Appellants hereby represent that they withdraw finally and with prejudice any claim under the ADEA that the differences in benefits between Appellants, as retirees, and active County employees violates the ADEA. Appellants stand on only their ADEA claim, as raised in their motion for partial summary judgment . . . , that the differences in benefits between Appellants and County retirees under age 65 violate the ADEA. Appellants do not and need not withdraw their state law claim in Count 2 of the complaint.

Appellants' letter at 6. Inasmuch as appellants are withdrawing with prejudice any ADEA claim not disposed of by the district court's September 30, 1999 order, we have jurisdiction under 28 U.S.C. § 1291.

We also note that Judge Shadur believes that inasmuch as the district court dismissed the state law claims without prejudice because it declined to assert jurisdiction over them, the judgment is not final and thus we do not have jurisdiction. This position is contrary to the understanding of the judges of this court, as we regularly exercise jurisdiction over an appeal from the adjudication of the federal claims in such circumstances. *See, e.g., Reitz v. County of Bucks*, 125 F.3d 139, 143, 148 (3d Cir.1997).

Our practice clearly is correct for case law indicates that a court of appeals has jurisdiction under 28 U.S.C. § 1291 when the district court has divested itself of a case entirely, regardless of the fact that claims in the case may continue to go forward in state court. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-15, 116 S.Ct. 1712, 1718-20, 135 L.Ed.2d 1 (1996) (holding that a district court order remanding a removed action to state court on abstention grounds was appealable under section 1291 because it "put[ ] the litigants in this case effectively out of court, . . . and its effect is precisely to surrender jurisdiction of a federal suit to a state court.") (citation and internal quotation marks omitted); *Hudson United Bank v. LiTenda Mortgage Corp.*, 142 F.3d 151, 155 (3d Cir.1998) (jurisdiction existed under section 1291 over a district court order dismissing federal claims in an action removed from state court, despite the fact that the district court exercised its discretion under 28 U.S.C. § 1367(c) to remand supplemental state law claims to the state court); *Pennsylvania Nurses Ass'n v. Pennsylvania State Educ. Ass'n*, 90 F.3d 797, 801 (3d Cir.1996) (jurisdiction existed under section 1291 when the district court dismissed certain counts in an action removed from state court and remanded others pursuant to 28 U.S.C. § 1367(c); "[B]ecause the district court's remand order divested the federal court of all control over the action, our cases suggest that we would have jurisdiction under 28 U.S.C. § 1291."); *In re U.S.*

Healthcare, Inc., 193 F.3d 151, 159 (3d Cir.1999) (same; following *Pennsylvania Nurses*), cert. denied,—U.S.—, 120 S.Ct. 2687, 147 L.Ed.2d 960 (2000); *McLaughlin v. Arco Polymers, Inc.*, 721 F.2d 426, 428 n. 1 (3d Cir.1983) (jurisdiction existed under section 1291 to review a district court order transferring an action to state court due to lack of diversity jurisdiction; "The order below finding a lack of subject matter jurisdiction and transferring the action divested the court of all control of the action and is appealable as a final order."); *see also Trent v. Dial Med. of Florida, Inc.*, 33 F.3d 217, 220 (3d Cir.1994) ("Even dismissals without prejudice have been held to be final and appealable if they 'end [ ][the] suit so far as the District Court was concerned . . . .'") (citation omitted); *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 681 (9th Cir.1980) ("There is no danger of piecemeal appeal[s] confronting us if we find jurisdiction here, for nothing else remains in the federal courts.").

We recognize, of course, that Judge Shadur has cited numerous cases in support of his position. We have examined them all and conclude that none is apposite inasmuch as none involves a dismissal without prejudice of state law claims on the basis of the district court declining to exercise supplemental jurisdiction over them. While the district court's order in this case did permit appellants to reinstitute their dismissed state law claims, they could do so only in state court, as there would be no basis for the district court to exercise jurisdiction over such a reinstituted action. Thus, we have jurisdiction over this appeal.

III. DISCUSSION

Our resolution of the issue presented on this appeal requires a detailed analysis of the OWBPA as well as the circumstances which led to its enactment. Our standard of review is plenary. *See Seibert v. Nusbaum, Stein, Goldstein, Bronstein & Compeau*, 167 F.3d 166, 170 (3d Cir.1999). We

will review the relevant background before proceeding to our analysis.

A. *The OWBPA*

1. Events preceding passage of the OWBPA

The OWBPA, passed in 1990, made several amendments to the ADEA. Congress passed the OWBPA for the express purpose of overruling the Supreme Court's decision in Public *Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989). *See* S.Rep. No. 101-263, at 16-17 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1521-22; *Auerbach*, 136 F.3d at 111-12. At the time of the *Betts* decision, section 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), provided that it was not unlawful for an employer "to observe the terms of . . . any bonafide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the ADEA. *See Betts*, 492 U.S. at 165, 109 S.Ct. at 2860. The governing interpretation of this version of section 4(f)(2) was provided by 29 C.F.R. § 1625.10, which employed the equal benefit or equal cost standard to determine if an employee benefit plan was a "subterfuge" to evade the purposes of the ADEA. *See* 29 C.F.R. § 1625.10 (1989); S.Rep. No. 101- 263, at 8-12 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1512-17.[5] The regulation provided:

> In order for a bona fide employee benefit plan which prescribes lower benefits for older employees on account of age to be within the section 4(f)(2) exception, it must

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[5] The Department of Labor recognized the equal benefit or equal cost principle in a regulation issued in 1969. Effective July 1, 1979, enforcement authority over the ADEA was transferred from the Department of Labor to the EEOC. The EEOC continued the Labor Department regulations relating to section 4(f)(2) of the ADEA, which were recodified at 29 C.F.R. § 1625.10. *See* S.Rep. No. 101-263, at 8-12 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1512-17.

> not be 'a subterfuge to evade the purposes of [the] Act.' In general, a plan or plan provision which prescribes lower benefits for older employees on account of age is not a 'subterfuge' within the meaning of section 4(f)(2), provided that the lower level of benefits is justified by age-related cost considerations.

29 C.F.R. § 1625.10(d) (1989). Based on this regulation, it was held prior to *Betts* that an employer could avail itself of the section 4(f)(2) safe harbor only if it provided either equal benefits to older and younger workers or incurred equal costs on behalf of each. *See* S.Rep. No. 101-263, at 8-12, 18 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1512-17, 1523; Auerbach, 136 F.3d at 111 (Prior to *Betts*, "for a plan to comply with the ADEA, the employer had to show that it either provided the same benefits to older employees or incurred the same costs on behalf of older employees. Under this 'equal benefit or equal cost' principle, so long as the employer could provide a cost-based justification for the disparate benefits, the plan would not be a 'subterfuge.'").

In *Betts*, the Supreme Court viewed the law quite differently. The Court rejected the equal benefit or equal cost principle of 29 C.F.R. § 1625.10 as inconsistent with the plain meaning of the word "subterfuge," which the Court viewed as "a scheme, plan, stratagem, or artifice of evasion." *See Betts*, 492 U.S. at 169-75, 109 S.Ct. at 2862-65. Instead, the Court interpreted section 4(f)(2) as "exempting the provisions of a bona fide benefit plan from the purview of the ADEA so long as the plan is not a method of discriminating in other, non-fringe-benefit aspects of the employment relationship." *Id.* at 177, 109 S.Ct. at 2866. Thus, "under this construction of the statute, Congress left the employee benefit battle for another day, and legislated only as to hiring and firing, wages and salaries, and other non-fringe-benefit terms and conditions of employment." *Id.* at 177, 109 S.Ct. at 2867. The Court

placed a substantial burden on a plaintiff seeking to challenge age-based discrimination in employee benefits:

> [W]hen an employee seeks to challenge a benefit plan provision as a subterfuge to evade the purposes of the Act, the employee bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some non-fringe-benefit aspect of the employment relation.

Id. at 181, 109 S.Ct. at 2868.

The Court of Appeals for the Second Circuit has described the implications of Betts as follows:

> According to the Court [in *Betts*], § 4(f)(2) provided a broad exemption for employee benefit plans under the ADEA, and therefore the general prohibitions regarding the unlawfulness of discrimination against older employees found in § 4(a)(1) did not apply to employee benefit plans. . . .
>
> . . . [T]he Court rejected the 'equal benefit or equal cost' principle by determining that an employer need not demonstrate a legitimate cost justification for age-based reductions in benefits. . . . Instead, the Court required an employee to prove that the challenged plan intended to serve the purpose of discriminating in some non-fringe-benefit aspect of the employment relation, such as hiring, firing and wages, in order to establish an ADEA violation. This interpretation would effectively validate virtually all age- based restrictions in [employee benefit plans] absent the requisite showing by an employee that the employer subjectively intended to discriminate.

Auerbach, 136 F.3d at 111 (citations and internal quotation marks omitted).

2. Passage of the OWBPA

Congress acted quickly to overrule *Betts*. Section 101 of the OWBPA clearly stated Congress' purpose:

> The Congress finds that, as a result of the decision of the Supreme Court in *Public Employees Retirement System of Ohio v. Betts* . . . legislative action is necessary to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.), which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations.

OWBPA § 101. Section 102 of the OWBPA specifically defined the term "compensation, terms, conditions, or privileges of employment" in the ADEA to include "all employee benefits." OWBPA § 102 (codified at 29 U.S.C. § 630(l)); *see also* S.Rep. No. 101-263, at 16 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1521-22 ("Through this legislation, Congress intends to make unmistakably clear that the ADEA's purpose of eliminating arbitrary age discrimination in employment includes the elimination of age discrimination in all forms of employee benefits."). Section 103 of the OWBPA deleted the "subterfuge" language in section 4(f)(2) of the ADEA and replaced it with the current provision, including the express codification of the equal benefit or equal cost standard in section 4(f)(2)(B)(i). WBPA § 103(1) (codified at 29 U.S.C. § 623(f)(2)). By making this change, Congress intended "to make clear that . . . the *only* justification for age discrimination in an employee benefit is the increased cost in providing the particular benefit to older individuals." S.Rep. No. 101-263, at 18 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1523 (emphasis in original); *see also Auerbach*, 136 F.3d at 112 ("Section 4(f)(2)(B)(i) [as adopted in the OWBPA] governs employee benefits and

expressly adopts the 'equal benefit or equal cost' principle, once and for all, ending judicial speculation as to the exact meaning of the earlier 'subterfuge' provision."). Section 103 of the OWBPA also clarified that the burden is on the employer to establish that the equal benefit or equal cost standard has been satisfied. OWBPA § 103(1) (codified at 29 U.S.C. § 623(f)(2)).

The OWBPA made further changes to the ADEA, including the addition of a safe harbor allowing employers to deduct the value of retiree health benefits and pension "sweeteners" from severance pay in the event of a "contingent event unrelated to age," such as a plant shutdown or lay-off. OWBPA § 103(3) (codified at 29 U.S.C. § 623(l)(2)).

3. Legislative history of the OWBPA

Numerous items in the legislative history of the OWBPA are relevant to the issue now before us. We will review these items in chronological order.

On April 5, 1990, the Senate Committee on Labor and Human Resources issued its report on S. 1511, which eventually became the OWBPA. The report commented as follows regarding retiree health benefits and Medicare:

> The Committee intends to approve the . . . practice of integrating retiree health benefits with Medicare, which is already permitted under the regulation. *See* 29 C.F.R. 1625.10(e). The availability of Medicare benefits from the federal government will not justify a reduction in employer-provided retiree health benefits if the result is that, taking the employer-provided and government-provided benefits together, an older retiree is entitled to a lesser benefit of any type . . . than a similarly situated younger retiree. *See id.*

S.Rep. No. 101-263, at 21-22 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1527.

The regulatory provision cited by the Senate Committee, 29 C.F.R. § 1625.10(e), is entitled "Benefits provided by the Government" which reads:

> An employer does not violate the Act [ADEA] by permitting certain benefits to be provided by the Government, even though the availability of such benefits may be based on age. For example, it is not necessary for an employer to provide health benefits which are otherwise provided to certain employees by Medicare. However, the availability of benefits from the Government will not justify a reduction in employer-provided benefits if the result is that, taking the employer-provided and Government-provided benefits together, an older employee is entitled to a lesser benefit of any type . . . than a similarly situated younger employee. For example, the availability of certain benefits to an older employee under Medicare will not justify denying an older employee a benefit which is provided to younger employees and is not provided to the older employee by Medicare.

29 C.F.R. § 1625.10(e) (1989). This provision, and the Senate Committee's apparent approval of it,[6] supports appellants' argument that the equal benefit or equal cost standard applies and must be satisfied when an employer reduces health benefits for retirees eligible for Medicare.

S. 1511 was debated on the floor of the Senate later in 1990. During the debates, Senator Grassley entered into the record several concerns he had about the bill, including the following:

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[6] On the floor of the Senate, Senators Hatch and Metzenbaum indicated that "coordination with government-provided benefits as specified by the EEOC guideline [29 C.F.R. § 1625.10] . . . would remain permissible" under the OWBPA. *See* 136 Cong. Rec. S13,808 (daily ed. Sept. 25, 1990) (statements of Sens. Hatch and Metzenbaum).

> Some companies do provide health insurance coverage for retirees, but cease such insurance coverage when the retiree becomes eligible for Medicare. Thus, such companies would be spending more for their younger retirees, who are not eligible for Medicare, than for their older retirees, who are receiving Medicare.
>
> If the bill is enacted, would such a company be in violation of the law? Is that the sponsors [sic] intention? If not, what provision in the bill protects employers in such circumstances?

136 Cong. Rec. S13,297-98 (daily ed. Sept. 18, 1990).

On September 24, 1990, an amended final substitute version of S. 1511 was proposed on behalf of Senators Metzenbaum, Hatch, Pryor, Heinz, and Jeffords. *See* 136 Cong. Rec. S13,594 (daily ed. Sept. 24, 1990). This final substitute represented a compromise among the bill's managers. *See* 136 Cong. Rec. S13,597 (daily ed. Sept. 24, 1990) (statement of Sen. Metzenbaum). One of the compromise points was to "[c]hange the word 'individual' in section 4(f)(2)(B) [of the ADEA] back to 'worker.'" 136 Cong. Rec. S13,599 (daily ed. Sept. 24, 1990) ("Summary of Pryor-Hatch-Metzenbaum-Heinz Agreement on Betts Legislation"). The legislative history does not reveal why the managers made this change.

The same day, a Statement of Managers for the final substitute was entered into the record. The Statement included the following passage, captioned "Retiree Health":

> Many employer-sponsored retiree medical plans provide medical coverage for retirees only until the retiree becomes eligible for Medicare. In many of these cases, where coverage is provided to retirees only until they attain Medicare eligibility, the value of the employer-provided retiree medical benefits exceeds the value of the retiree's Medicare benefits.

> Other employers provide medical coverage to retirees at a relatively high level until the retirees become eligible for Medicare and at a lower level thereafter. In many of these cases, the value of the medical benefits that the retiree receives before becoming eligible for Medicare exceeds the total value of the retiree's Medicare benefits and the medical benefits that the employer provides after the retiree attains Medicare eligibility. These practices are not prohibited by this substitute. Similarly, nothing in this substitute should be construed as authorizing a claim on behalf of a retiree on the basis that the actuarial value of employer-provided health benefits available to that retiree not yet eligible for Medicare is less than the actuarial value of the same benefits available to a younger retiree.

136 Cong. Rec. S13,597 (daily ed. Sept. 24, 1990) (emphasis added). This passage indicates an intent to permit employers to reduce or eliminate health benefits for Medicare-eligible retirees without satisfying the equal benefit or equal cost standard.

Senator Hatch made the following pertinent comments after the Statement of Managers was entered into the record:

> Many employers continue health benefits for persons who retire before they are eligible for Medicare and/or continue certain benefits that are supplemental to Medicare.
>
> This is a positive practice which helps provide important protections for retirees.
>
> This compromise ensures that the bill will not interfere with these important benefits that are vital to retirees of all ages.
>
> * * * *

> It has been our policy to encourage employers to provide generous employee benefits. Clearly, this objective is frustrated, if not defeated, if Congress enacts legislation that so heavily encumbers American companies that they must reduce or eliminate such benefits.
>
> * * * *
>
> We must be concerned about the impact on all employees of additional Federal requirements that unnecessarily complicate existing arrangements or that will shift a firm's resources from actual benefits into regulatory compliance or litigation.
>
> If an employer is forced to reduce or eliminate benefits for some workers to avoid litigation exposure or to avoid going afoul of the law, we have to ask the question: Is it worth it?

136 Cong. Rec. S13,600 (daily ed. Sept. 24, 1990).

Comments made during the Senate debate reveal that some Senators were concerned primarily with prohibiting age-based benefits discrimination against older *active employees*-discrimination which might force those employees into early retirement. *See* 136 Cong. Rec. S13,601 (daily ed. Sept. 24, 1990) (statement of Sen. Adams) ("We should not allow [older workers] to be forced out by policies that . . . overly discriminate against them because of age. . . ."); 136 Cong. Rec. S13,602 (daily ed. Sept. 24, 1990) (statement of Sen. Heinz) ("Although more subtle than mandatory retirement, discrimination of [sic] employee benefits can, and it does, coerce workers into early resignation and retirement."). Yet, Senator Kerry made a statement indicating that he believed the bill would aid retirees as well as active employees. *See* 136 Cong. Rec. S13,608 (daily ed. Sept. 24, 1990) (statement of Sen. Kerry) ("Older individuals depend on employee benefits to protect them from what can amount to crippling

medical care costs as well as to provide them with a secure retirement.").

Later in the debate, Senators Bentsen and Pryor engaged in an exchange regarding retiree health coverage. Senator Pryor expressed the view that the ADEA does not apply to retirees except when a person's retirement benefits are "discriminatorily structured" prior to retirement:

> MR. BENTSEN. Is it the understanding of the Senator that the Age Discrimination in Employment Act does not apply to retirees?
>
> MR. PRYOR. The distinguished Senator is correct. The ADEA applies only to employees and those individuals seeking employment. However, it does apply to an individual whose retirement benefits are discriminatorily structured prior to retirement.

136 Cong. Rec. S13,609 (daily ed. Sept. 24, 1990). Senator Bentsen then expressed concern about the lawfulness of the Texas Teacher Retirement System, which employed a Medicare Part B "carve out" and therefore provided less health coverage to retirees 65 and over than to younger retirees. Senator Bentsen indicated that this was an "age based distinction" which "at least raises the issue of whether the system is violating the ADEA's ban against age discrimination in employee benefits." The following exchange then took place:

> [MR. BENTSEN.] If the system pays approximately the equivalent amount to purchase the private insurance for the prospective retiree under 65 as for the prospective retiree 65 or older, does the system's retiree health packages [sic] violate the ADEA as amended by this bill?
>
> MR. PRYOR. I would say to my good friend from Texas that I wish I could give him a more definite

> answer than the one I am about to give. I know that he wants to provide a comfort level with this legislation for the Texas State Teacher's Retirement System.
>
> The purpose of equal benefit or equal cost is to allow employers to take account of the fact that the cost of some benefits rises with the age of the employee. If your scenario is correct and the system spends the same amount in acquiring health coverage for all prospective retirees regardless of age, I would say that the system has a good argument that it has satisfied the equal benefit or equal cost principle.

136 Cong. Rec. S13,609-10 (daily ed. Sept. 24, 1990).

This exchange indicates that the equal benefit or equal cost standard is applicable when an employer reduces its coverage for Medicare-eligible retirees. However, the context of the exchange—including the use of the term "prospective retiree"—indicates that the Senators limited their discussion to cases where the retiree health program is "discriminatorily structured prior to retirement." In the case before us, it is apparent that SecurityBlue was adopted after the class members retired. *See Erie County*, 91 F.Supp.2d at 875; App. at 13.

S. 1511 was passed by the Senate on September 24, 1990, and subsequently considered by the House of Representatives. *See* 136 Cong. Rec. S13,611 (daily ed. Sept. 24, 1990); 136 Cong. Rec. H8614 (daily ed. Oct. 2, 1990). In the House, Representative Clay introduced into the record an "Explanation of S. 1511" which expressed a similar view as that espoused by Senator Pryor regarding the applicability of the ADEA to retirees:

> Since the ADEA covers only employees and those individuals seeking employment, nothing in the bill would apply the provisions of the ADEA to retirees. Thus, for example, it would not be a violation of the

> ADEA, if an employer provided an *ad hoc* cost-of-living adjustment to all current retirees above a certain age. Of course, nothing in the bill would alter the current protection under the ADEA for an employee whose retirement or health benefits are discriminatorily structured based on age at the time of retirement. Thus the 'equal benefit or equal cost' rule would continue to apply to any such promise upon retirement.

136 Cong. Rec. H8618 (daily ed. Oct. 2, 1990).

Later, Representative Goodling introduced into the record a summary of the "improvements" in the final version of S. 1511. According to the summary, the bill "clarifie[s] that employers are not required to provide equivalent retiree health coverage to Medicare eligible and pre-Medicare eligible retirees." 136 Cong. Rec. H8621 (daily ed. Oct. 2, 1990). If such was Congress' intent, however, we do not see any language in the OWBPA making the point clear.[7]

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[7] Senator Hatch proposed several amendments to S. 1511 which would have addressed the issue directly. Amendment No. 2695 would have inserted "[a]t the appropriate place" the following language: "Nothing herein shall be construed as requiring that Medicare-eligible retirees are entitled to the same benefits as non-Medicare eligible retirees." *See* 136 Cong. Rec. S13,443 (daily ed. Sept. 19, 1990). Amendment No. 2698 would have added a provision making it lawful for an employer "to observe the terms of a retiree health benefits plan which assumes that its eligible retirees have enrolled in Medicare, Part B and does not pay for benefits that would be paid under the Part B coverage, provided that the plan must provide for the payment of the eligible retirees' premiums for part B coverage." *See* 136 Cong. Rec. S13,444 (daily ed. Sept. 19, 1990). Amendment No. 2704 would have inserted the following language into section 4(f) of the ADEA: "[N]othing in this bill shall be construed as requiring that Medicare-eligible retirees are entitled to the same benefits, after taking into account Medicare benefits, as non-Medicare eligible retirees." *See* 136 Cong. Rec. S13,444 (daily ed. Sept. 19, 1990). The legislative history does not indicate why these amendments were not adopted.

Accordingly, we are left with a rather difficult task of statutory interpretation in this case.

We proceed now to our analysis of the matter. While the legislative history may provide assistance in resolving ambiguity, the language of the statute must guide us in the first instance. *See In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 444 (3d Cir.1996).

B. *Analysis*

II. Section 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1)

The first step in our analysis is to determine whether plaintiffs have established a claim of age discrimination under section 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1). That provision makes it unlawful for an "employer" to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." Obviously, all members of the plaintiff class are "individuals." The question arises, then, whether members of the—who had ceased actively working before they were placed in SecurityBlue—have been treated less favorably by their "employer" with respect to their "compensation, terms, conditions, or privileges of employment." The latter phrase is explicitly defined in the ADEA, as amended by the OWBPA, to include "all employee benefits." *See* 29 U.S.C. § 630(l). The term "employee benefits" is not defined in the statute, but the terms "employer" and "employee" are. *See* 29 U.S.C. §§ 630(b), (f) ("The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . ."; "The term 'employee' means an individual employed by any employer. . . ."). We believe that the ordinary meaning of the term "employee benefit" should be understood to encompass health coverage and other benefits

which a retired person receives from his or her former employer.

The Supreme Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997), supports our interpretation. *Robinson* addressed the applicability of the anti-retaliation provision in Title VII of the Civil Rights Act of 1964 to actions taken against former employees. *See id.* at 339, 117 S.Ct. at 845. The plaintiff in *Robinson* had filed an EEOC charge alleging that Shell discharged him because of his race. *Id.* When the plaintiff applied for a job with another company, Shell allegedly retaliated against him by issuing a negative reference. *Id.* Title VII's anti-retaliation provision, section 704(a), 42 U.S.C. § 2000e-3(a)—which is nearly identical to the ADEA's anti-retaliation provision, *see* 29 U.S.C. § 623(d)—makes it unlawful "for an employer to discriminate against any of his employees or applicants for employment" because they have opposed discrimination. Section 701(f) of Title VII, 42 U.S.C. § 2000e(f), defines "employee" as "an individual employed by an employer"—the same definition present in the ADEA. The Court in *Robinson* stated that, "[a]t first blush, the term 'employees' . . . would seem to refer to those having an existing employment relationship with the employer in question." *Robinson*, 519 U.S. at 341, 117 S.Ct. at 846. However, the Court found that "[t]his initial impression . . . does not withstand scrutiny" because "the word 'employed' [in the definition of 'employee'] . . . could just as easily be read to mean 'was employed.'" *Id.* at 341, 342, 117 S.Ct. at 846, 847. The Court thus found the term "employees" to be "ambiguous as to whether it excludes former employees." *Id.* at 341, 117 S.Ct. at 846. The Court then construed this ambiguity in favor of Title VII's broad remedial purposes, and thus held that the anti-retaliation provision covered former employees. *See id.* at 345-46, 117 S.Ct. at 848-49.

Robinson indicates that an employer's adverse actions taken against someone who has ceased actively working for that employer may constitute discrimination against an "employee." By analogy, an employer who treats retirees differently with respect to their health coverage because of their age may have engaged in discrimination with respect to "employee benefits."

The *Robinson* Court did note that the term "employee" may not have "the same meaning in all other sections [of Title VII] and in all other contexts"; thus, "each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute." See id. at 343-44, 117 S.Ct. at 847. Nevertheless, we believe that the term "employee benefits" as used in 29 U.S.C. § 630(l) is broad enough to encompass retiree health coverage. *See Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1079, 1081, 103 S.Ct. 3492, 3496, 3497-98, 77 L.Ed.2d 1236 (1983) ("There is no question that the opportunity to participate in a deferred compensation plan constitutes a 'conditio[n] or privileg[e] of employment' [within the meaning of Title VII's main prohibitory provision], and that retirement benefits constitute a form of 'compensation.'"; "We have no hesitation in holding . . . that the classification of employees on the basis of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage.").

We recognize that there are statements in the legislative history of the OWBPA which indicate that certain members of Congress viewed the ADEA as inapplicable to retirees except when a retiree's benefits are "discriminatorily structured prior to retirement." But we see nothing in the language of the ADEA to indicate that these statements are accurate and we do not find them to be persuasive. As the EEOC points out in its amicus brief, such an approach could lead to anomalous results:

> If Congress intended to broadly prohibit discrimination in 'all' employee benefits, including benefits that are available in the post-employment period, there is every reason to believe that Congress intended the protections of the statute to extend to discrimination that occurs in the post-employment period.
>
> Indeed, any other view of the statute would lead to irrational gaps in coverage that Congress could not have intended. It is clear that the ADEA covers discrimination in a post-employment benefit where the facially discriminatory policy is instituted while an individual is still an active employee. The individual could challenge the policy at the time of its adoption or upon retirement, when the policy is applied to the individual. The individual in such a case would have a claim even if the discrimination policy was adopted one day prior to the individual's date of retirement. Yet, if the policy were adopted two days later, one day after the date of retirement, the individual, as a 'retiree,' would be without a claim under the ADEA. It is inconceivable that Congress would in the same breath expressly prohibit discrimination in employee benefits, yet allow employers to discriminatorily deny or limit post-employment benefits to former employees at or after their retirement, although they had earned those employee benefits through years of service with the employer.

EEOC's br. at 16-17 (citation and internal quotation marks omitted). We find the EEOC's argument to be persuasive, and accordingly we conclude that the ADEA applies even when retiree benefits are structured discriminatorily after retirement.[8]

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[8] According to the district court, "Congress's primary purpose in passing the OWBPA was to prohibit the type of employee benefit discrimination . . . which might discourage older workers from remaining

In sum, we conclude that members of the plaintiff class are "individuals" who have been treated differently by their "employer" "with respect to [their] compensation, terms, conditions, or privileges of employment." The next question that arises is whether the class members have been so treated "because of . . . age."[9] The County argues that the decision to place Medicare-eligible retirees in SecurityBlue was motivated not by age but by three other factors: (1) active versus inactive employment status, (2) cost, and (3) availability of plans. The County argues that it simply placed each retiree in "the plan that is the least expensive to the County for which he or she qualifies." *See* appellee's br. at 44-45.

The County relies on *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993). In that case, the Supreme Court held that a claim for disparate treatment under the ADEA could not be maintained where the 62-year-

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in the workforce and/or punish older workers who remain actively employed." *Erie County*, 91 F.Supp.2d at 877. The district court may be correct in identifying this as the central aim of Congress, but we do not believe that the ADEA is limited to this purpose.

[9] Appellants' theory is that the County has adopted a facially discriminatory policy with respect to retiree health coverage. We have commented as follows regarding facially discriminatory policies:

We agree that when a policy facially discriminates on the basis of the protected trait, in certain circumstances it may constitute per se or explicit age discrimination. And, whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination. This is because, in a facial disparate treatment case, the protected trait by definition plays a role in the decision-making process, inasmuch as the policy explicitly classifies people on that basis. Thus, when the policy itself displays the unlawful categorization, the employee is relieved from independently proving intent. *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 726 (3d Cir.1995) (citations and internal quotation marks omitted).

old plaintiff was terminated a few weeks shy of attaining the ten years of service which he needed for his pension benefits to vest. *Id.* at 606-13, 113 S.Ct. at 1704-08. In so ruling, the Court stated that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." *Id.* at 609, 113 S.Ct. at 1705. "When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age. . ." *Id.* at 611, 113 S.Ct. at 1706 (emphasis in original). The Court found that "age and years of service are analytically distinct . . . and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.'" *Id.* at 611, 113 S.Ct. at 1707. The Court implied that the result might have been different if pension vesting had been based on age rather than years of service. *See id.* at 613, 113 S.Ct. at 1707 ("[W]e do not consider the special case where an employee is about to vest in pension benefits as a result of his age, rather than years of service, and the employer fires the employee in order to prevent vesting. That case is not presented here.") (citation omitted) (emphasis in original).

We find *Hazen Paper* to be distinguishable. Medicare eligibility does not merely "correlate[ ] with age," *see id.* at 608, 113 S.Ct. at 1705, as does years of service. Rather, as the district court here pointed out, Medicare eligibility "follow[s] ineluctably upon attaining age 65." *Erie County*, 91 F.Supp.2d at 867. *See* 42 U.S.C. § 13950. Thus, Medicare status is a direct proxy for age. This case is therefore parallel to the "special case" mentioned by the Court in *Hazen Paper*, where an adverse action is taken against a person because of a particular event (i.e. approaching pension vesting) and that event in turn occurs because the person has attained a certain age. *See DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 730 n. 12 (3d Cir.1995) (implying that the ADEA is violated

"when a company's policy distinguishes employees on the basis of a factor analytically indistinct from age").[10]

Johnson v. New York, 49 F.3d 75 (2d Cir.1995), illustrates the point. In *Johnson*, the New York State Division of Military and Naval Affairs employed the plaintiff as an air base security guard. *Id.* at 76-77. A mandatory condition of his employment was the maintenance of "dual status" as an active member of the Air National Guard ("ANG"). *Id.* When the plaintiff turned 60, he was forced to resign from the ANG due to his age, and in turn he was fired from his security guard position. *Id.* The Court of Appeals for the Second Circuit held that the termination violated the ADEA. *Id.* at 78-80. The court commented as follows in distinguishing Hazen Paper:

> The State's reliance on Hazen Paper is unavailing. The flaw in the State's argument is that the decision to require dual status [in the ANG], with consequent mandatory retirement at 60 . . . is not merely correlated with age; unlike *Hazen Paper*, the employer's decision here in fact implements an age- based criterion. Regardless of the State's reasons for requiring that certain of its civilian employees maintain ANG membership, there can be no doubt that [plaintiff's] age actually played a role and had a determinative influence on the decision to terminate his employment. In this

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[10] During debates on the OWBPA, Representative Clay indicated that Medicare status is a proxy for age. *See* 136 Cong. Rec. H8617 (daily ed. Oct. 2, 1990) (statement of Rep. Clay) ("[E]mployers must be prohibited from providing older workers smaller benefits or no benefits solely because of their age or other proxies for age for example, pension or Medicare eligibility."); *see also* S.Rep. No. 101-263, at 23 (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1528 (indicating that, where "[p]ension-eligibility is a proxy for age . . . it is per se age discrimination to use pension-eligibility as a basis for denying an older worker any other benefit.").

> case, age and termination are inextricably linked. The sole reason for [plaintiff's] loss of dual status and his consequent termination was age.

Id. at 79-80 (citation and internal quotation marks omitted).[11] Similarly, in our case, the County "implement[ed] an age-based criterion" by placing Medicare-eligible retirees in SecurityBlue.[12]

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[11] The court did not address whether the State may have been entitled to the defense applicable where age is a "bonafide occupational qualification." *See* 29 U.S.C. § 623(f)(1). The State had waived that defense in the district court. *See Johnson*, 49 F.3d at 78 n. 1.

[12] As mentioned, a retiree must meet two conditions in order to be placed in SecurityBlue: (1) Medicare eligibility and (2) residence in the SecurityBlue service area. *Erie County*, 91 F. Supp.2d at 863, 867. Thus, there is a "but-for" causal relationship between Medicare eligibility (which is a proxy for age) and placement in SecurityBlue—"but for" having attained age 65, members of the plaintiff class would not have been placed in SecurityBlue. *See Miller v. CIGNA Corp.*, 47 F.3d 586, 595-96 (3d Cir.1995) (en banc) ("A plaintiff in an ADEA case . . . has the burden of persuading the trier of fact . . . that there is a 'but-for' causal connection between the plaintiff's age and the employer's adverse action—i.e., that age actually played a role in the employer's decisionmaking process and had a determinative influence on the outcome of that process.") (citation and internal quotation marks omitted). Our conclusion is not affected by the fact that a person under 65 can qualify for Medicare based on disability as the members of the plaintiff class became Medicare-eligible based solely on age. *See* appellants' br. at 36.

Our conclusion might be different if the County placed in SecurityBlue only those retirees who actually *chose to enroll* in Medicare Part B. In that event, the determinative factor in the allegedly disparate treatment arguably would not be age but rather each individual's choice to enroll in Medicare Part B-that is, placement in SecurityBlue would not follow ineluctably upon attaining age 65. Here, however, the County chose to place in SecurityBlue *all* retirees residing in the SecurityBlue service area who reached Medicare age. *See* appellants' br. at 35. Accordingly, we must conclude that the members of the plaintiff class were placed in Security Blue "because of . . . age."

The fact that there is no reason to believe that the County possessed a malevolent motive or acted on the basis of hostile age-based stereotypes is irrelevant. The Supreme Court has indicated that a policy explicitly based on a prohibited factor—such as sex or age—is illegal regardless of the underlying motive:

> [T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination. . . . The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender- based policy is sex discrimination. . . .

International Union v. Johnson Controls, Inc., 499 U.S. 187, 199-200, 111 S.Ct. 1196, 1203-04, 113 L.Ed.2d 158 (1991); *see also City of Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 704-18, 98 S.Ct. 1370, 1373-80, 55 L.Ed.2d 657 (1978) (holding that employer's policy requiring female employees to make larger pension fund contributions than male employees violated Title VII even though the policy merely sought to take into account the well-established fact of female longevity).

The County argues that it "never had the option of offering SelectBlue to Medicare-eligible retirees such as plaintiffs because the underwriting criteria adopted by Highmark Blue Cross/Blue Shield disqualified Medicare-eligible retirees from enrollment in SelectBlue." *See* appellee's br. at 49. However, the Supreme Court has indicated that an employer cannot avoid responsibility for a facially discriminatory benefit plan simply because the discrimination arises from the criteria imposed by outside entities with whom the employer has contracted to participate in providing the benefit. *See Norris*, 463 U.S. at 1086-91, 103 S.Ct. at 3500-03. In *Norris*,

the State established a deferred compensation plan for its employees and selected several outside companies to participate in the plan. *Id.* at 1075-76, 103 S.Ct. at 3494- 95. Those companies employed sex-based mortality tables to calculate monthly retirement benefits; as a result, male retirees received higher monthly payments than women who had made the same contributions. *Id.* at 1077, 103 S.Ct. at 3495. The Supreme Court held that the plan was a violation of Title VII. *Id.* at 1079-86, 103 S.Ct. at 3496-3500. The Court commented as follows regarding the State's argument that it was the outside companies that were responsible for calculating the benefits:

> Under these circumstances there can be no serious question that [the State] [is] legally responsible for the discriminatory terms on which annuities are offered by the companies chosen to participate in the plan. Having created a plan whereby employees can obtain the advantages of using deferred compensation to purchase an annuity only if they invest in one of the companies specifically selected by the State, the State cannot disclaim responsibility for the discriminatory features of the insurers' options. Since employers are ultimately responsible for the 'compensation, terms, conditions, [and] privileges of employment' provided to employees, an employer that adopts a fringe-benefit scheme that discriminates among its employees on the basis of race, religion, sex, or national origin violates Title VII regardless of whether third parties are also involved in the discrimination. . . . It would be inconsistent with the broad remedial purposes of Title VII to hold that an employer who adopts a discriminatory fringe benefit plan can avoid liability on the ground that he could not find a third party willing to treat his employees on a nondiscriminatory basis. An employer who confronts such a situation must either supply the fringe benefit himself . . . or not provide it at all.

Id. at 1089-91, 103 S.Ct. at 3501-03 (footnotes omitted).

In sum, we conclude that the County has treated appellants differently than other retirees with respect to their "compensation, terms, conditions, or privileges of employment, because of . . . age." Accordingly, appellants have established a claim of age discrimination under 29 U.S.C. § 623(a)(1), unless any of the ADEA's "safe harbors" is applicable.

2. Safe harbors

Appellants contend that the only possibly applicable safe harbor under the ADEA is that set forth in 29 U.S.C. § 623(f)(2)(B)(i), which adopts the equal benefit or equal cost principle. Appellants argue that the County cannot satisfy that principle because it is providing lesser benefits to retirees age 65 and over as compared to younger retirees while simultaneously incurring lesser costs on the older retirees' behalf. The County argues that it is entitled to the benefit of the "reasonable factors other than age" defense set forth in 29 U.S.C. § 623(f)(1). The district court merely held that "the ADEA clearly was not intended to apply to retirees, like the Plaintiffs here, who premise their complaint on alleged disparities in their retirement health benefits based on Medicare-eligibility." Erie County, 91 F.Supp.2d at 880. Thus, the district court's view is that employers may treat Medicare-eligible retirees differently with respect to health benefits without meeting the equal benefit or equal cost standard. Effectively, then, the district court recognized a safe harbor in addition to any explicitly set forth in the ADEA or the OWBPA.

The legislative history, as described above, contains items indicating that members of the Congress which passed the OWBPA viewed the ADEA as having limited applicability to retirees. Some items in the legislative history directly express the view that employers lawfully may reduce or eliminate

health coverage for Medicare-eligible retirees. We cannot, however, accept the district court's approach for the straightforward reason that it is not reflected in the actual language of the ADEA or the OWBPA. Congress knew how to craft exceptions to the ADEA, as there are several explicitly worded safe harbors in 29 U.S.C. § 623. Yet, aside from section 623(f)(2)(B)(i), there is no provision in the ADEA permitting an employer to treat retirees differently with respect to health benefits based on Medicare eligibility.[13]

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[13] The Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), Pub.L. No. 97-248, 96 Stat. 324, 353 (1982), added a new subsection (g) to section 4 of the ADEA, providing as follows: "[A]ny employer must provide that any employee aged 65 through 69 shall be entitled to coverage under any group health plan offered to such employees [sic] under the same conditions as any employee under age 65." TEFRA § 116(a). The EEOC interpreted section 4(g) as applying to active employees and not retirees. See 48 Fed.Reg. 26,435 (1983). Section 4(g) was repealed in 1989. *See* Pub.L. No. 101-239, 103 Stat. 2106, 2233. A similar provision is now present in the Medicare Act. See 42 U.S.C. § 1395y(b)(1)(A). That provision is limited to those who have "current employment status with an employer." *Id.* We do not believe that the former section 4(g) of the ADEA or the EEOC's interpretation thereof has any bearing on this case, as that provision is no longer part of the statute. Nor does 42 U.S.C. § 1395y(b)(1)(A) have any relevance, as that provision is expressly limited to active employees.

We also note that section 103(3) of the OWBPA addressed the subject of retiree health benefits by establishing a safe harbor permitting an employer to deduct the value of retiree health benefits and pension "sweeteners" from severance pay in the event of a "contingent event unrelated to age." *See* 29 U.S.C. § 623(l)(2). In order to make the deduction under this provision, the "package" of retiree health benefits for those "below age 65" must be "at least comparable to benefits provided under title XVIII of the Social Security Act," and the "package" of benefits for those "age 65 and above" must be "at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act." *See* 29 U.S.C. § 623(l)(2)(D). In addition, the provision discusses how the value of retiree health benefits is to be calculated, depending on whether the

We are not persuaded that the "reasonable factors other than age" defense is applicable. While it is possible that Congress intended Medicare eligibility to be a "reasonable factor other than age," we believe it is more likely that Congress would have drafted a specific provision addressing the issue rather than to rely on the courts to make a particular interpretation of the term "reasonable factors other than age." In reaching this conclusion, we point out that the legislative history we have cited demonstrates that when Congress passed the OWBPA it expressly considered the issue of availability of Medicare coverage. In addition, we note that the "reasonable factors other than age" defense has been held inapplicable to a policy which explicitly discriminates based on age. *See EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1541 (2d Cir.1996) ("[A]n employer has a defense if his policy is based on reasonable factors 'other than age,' not if the policy is reasonably based on age. By its terms, the statute supplies an exception for 'age- neutral' decisions based on other factors such as health or even education that might be correlated with age, not an exception for policies that explicitly but reasonably discriminate based on age.") (citation omitted). Here, the County has engaged in explicit age-based discrimination by using a proxy for age—Medicare eligibility—as a basis for differential treatment.

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employer's obligation to provide the benefits is of "limited duration" or "unlimited duration." *See* 29 U.S.C. § 623(l)(2)(E). Clearly, section 623(l)(2) contemplates that an employer might reduce retiree health benefits at age 65. However, this provision expressly states that its description of retiree health benefits is "[f]or purposes of this paragraph and solely in order to make the deduction authorized under this paragraph." *See* 29 U.S.C. § 623(l)(2)(D). This statement indicates that Congress did not intend this provision to affect the interpretation of other portions of the ADEA. *See* 136 Cong. Rec. H8628 (daily ed. Oct. 2, 1990) (statement of Rep. Clay); 136 Cong. Rec. S15,399 (daily ed. Oct. 16, 1990) (statement of Sen. Hatch). Accordingly, this provision does not affect our analysis.

We believe that the appellants have put forth the proper interpretation of the statute, and thus we hold that the safe harbor set forth in 29 U.S.C. § 623(f)(2)(B)(i) is applicable in this case if the County can come within it. The plain language of section 623(f)(2)(B)(i) supports this conclusion by expressly adopting the statement of the equal benefit or equal cost principle as set out in 29 C.F.R. § 1625.10 (1989). As discussed, subsection (e) of that regulation expressly contemplates application of the equal benefit or equal-cost standard in the Medicare eligibility situation. *See* 29 C.F.R. § 1625.10(e) (1989) ("[I]t is not necessary for an employer to provide health benefits which are otherwise provided to certain employees by Medicare. However, the availability of benefits from the Government will not justify a reduction in employer-provided benefits if the result is that, taking the employer-provided and Government-provided benefits together, an older employee is entitled to a lesser benefit of any type . . . than a similarly situated younger employee."). The Senate Report accompanying S. 1511 contemplated that section 1625.10(e) would apply to retirees. *See* S.Rep. No. 101-263, at 21-22 (1990), *reprinted* in 1990 U.S.C.C.A.N. 1509, 1527 ("The Committee intends to approve the . . . practice of integrating retiree health benefits with Medicare, which is already permitted under the regulation. *See* 29 C.F.R.§ 1625.10(e). The availability of Medicare benefits . . . will not justify a reduction in employer-provided retiree health benefits if the result is that, taking the employer-provided and government- provided benefits together, an older retiree is entitled to a lesser benefit of any type . . . than a similarly situated younger retiree."). Accordingly, the plain language of section 623(f)(2)(B)(i)—through its express reference to 29 C.F.R. § 1625.10—indicates that Congress intended section 623(f)(2)(B)(i) to apply when an employer reduces health benefits based on Medicare eligibility.

We acknowledge that our analysis is complicated by the presence of the term "older worker" in section 623(f)(2)(B)(i). As mentioned, the legislative history of the OWBPA reveals that Congress specifically chose the word "worker" over "individual" in this provision. *See* 136 Cong. Rec. S13, 599 (daily ed. Sept. 24, 1990) ("Summary of Pryor-Hatch-Metzenbaum-Heinz Agreement on Betts Legislation"). However, it is unclear why Congress made this change or what significance it was supposed to have. "Worker" is the term used in 29 C.F.R. § 1625.10(a)(1) in its description of the equal benefit or equal cost principle. Thus, Congress may have chosen this word merely because it wished to have congruity between the language of section 623(f)(2)(B)(i) and the language of the regulation. If that is the case, then Congress did not adopt the word "worker" with the specific intention of excluding retirees. In any event, the presence of the word "worker" is a rather thin reed upon which to base a conclusion that Congress intended to grant employers the unfettered right to reduce or eliminate health benefits for Medicare-eligible retirees if the employers maintain such benefits for other retirees. Again, if that was Congress' intent, presumably it would have adopted a specific provision to that effect.

We believe it makes good sense and furthers Congress' intent to apply the equal benefit or equal cost principle in this case. Section 623(f)(2)(B)(i) undoubtedly applies when an employer makes an age-based distinction in benefits for active employees. The equal benefit or equal cost standard similarly can be applied when an employer makes an age-based distinction in benefits for *retirees*. Further, the rule strikes a fair middle ground between the interests of the employer and the interests of older retirees. In order to take advantage of the safe harbor, an employer need not provide equal benefits to older and younger retirees, and it need not spend more on behalf of older retirees. It merely must spend

equally. Thus, the rule avoids overburdening employers to such an extent that they will be tempted to throw up their hands and eliminate benefits for all retirees.[14] While some employers may choose that course, we believe far more will continue to provide retirement benefits in a manner which is lawful under the ADEA.

In sum, we hold that the safe harbor set forth in 29 U.S.C. § 623(f)(2)(B)(i) is applicable if the County can meet the equal benefit or equal cost standard. This matter therefore will be remanded to the district court for a determination as to whether the standard has been satisfied.

3. Proper application of the standard

A few words on the proper application of the equal benefit or equal cost standard are warranted. In accordance with 29 C.F.R. § 1625.10(e), the "equal benefit" prong of the analysis should take into account equally both the Medicare-provided and the County-provided benefits which members of the plaintiff class receive. If the County cannot satisfy the "equal benefit" prong, the court should then turn to the "equal cost" inquiry. The County argues that, in applying the "equal cost" analysis, the court should consider the costs which *Medicare* incurs on behalf of persons in SecurityBlue as well as the costs which the County itself incurs. *See* appellee's br. at 57-59. We disagree. Clearly, the purpose of the equal benefit or equal cost standard is to encourage employers to spend equally on benefits for older and younger persons. *See* 136 Cong. Rec. S13,609 (daily ed. Sept. 24, 1990) (statement of

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[14] We obviously do not decide whether an employer acts lawfully in treating retirees differently than active employees with respect to the provision of benefits for, as we noted above, appellants have abandoned their claim based on this distinction. We do note, however, that it would seem difficult to contend that such a distinction would be based on any "individual's age," *see* 29 U.S.C. § 623(a)(1), as it would be predicated instead on the individual's employment status.

Sen. Bentsen) ("[T]he [equal benefit or equal cost] rule does not require that an older worker receive the exact same level of a benefit that a younger worker receives, as long as *the employer* incurs the same cost in purchasing the benefit for the older worker as for the younger worker.") (emphasis added); 136 Cong. Rec. H8617 (daily ed. Oct. 2, 1990) ("Explanation of S. 1511" prepared by Rep. Clay) ("Under this approach [equal benefit or equal cost], an employer that provides a particular employee benefit must generally provide the same benefit to all workers. But if the cost to that employer of providing that benefit is greater for older workers than younger workers, the employer may provide a smaller benefit to older workers, so long as *the employer* spends at least the same amount of money for all workers.") (emphasis added). Accordingly, the district court should consider only those costs which the County itself incurs.[15]

IV. CONCLUSION

In sum, we hold (1) that appellants have established a claim under 29 U.S.C. § 623(a)(1) because they have been treated differently in their "compensation, terms, conditions, or privileges of employment, because of . . . age" and (2) that the safe harbor provided under 29 U.S.C. § 623(f)(2)(B)(i) is applicable if the County can meet the equal benefit or equal cost standard. Consequently, we will reverse the order for

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[15] We recognize that our conclusion on the effect of Medicare expenditures may eliminate the possibility of an employer satisfying the equal cost safe harbor in situations in which classes of individuals are divided depending upon the presence of Medicare eligibility. We acknowledge this possibility because it seems logical to believe that employers whose retirees have Medicare coverage will be able to shift a large portion of the cost of health care coverage to Medicare. The record, however, does not include information on this point. Nevertheless, even assuming that the equal cost safe harbor never will be available in Medicare situations, we are satisfied that we have reached the correct result with respect to the effect of Medicare expenditures.

partial summary judgment entered September 30, 1999, and will remand the matter to the district court for further proceedings consistent with this opinion, including giving the County the opportunity to establish its entitlement to a safe harbor under 29 U.S.C. § 623(f)(2)(B)(i). In addition, the state law claims over which the district court declined to exercise jurisdiction shall be reinstated.[16]

SHADUR, Senior District Judge, dissenting:

This dissent is triggered by the most fundamental of considerations: the lack of a final order below, creating a lack of jurisdiction over this appeal. Because the litigants themselves had not perceived that as an issue in their respective briefs, our panel called the matter to their attention sua sponte (the appropriate handling whenever jurisdiction is in question). And as the majority opinion reflects at page 13, appellants' letter response left no doubt that we were indeed not dealing with a full deck:

> Appellants do not and need not withdraw their state law claim in Count 2 of the complaint.

What we have then is a situation in which, by the express choice of appellants-plaintiffs acting through their counsel, their Count 2 claim under state law—a claim that comes to the federal courts under the auspices of the supplemental jurisdiction conferred by 28 U.S.C. § 1367(a)—remains fully viable. And that being so, the district court's substantive decision as to appellants' Count 1 ADEA claim—a decision that is the only subject of the present appeal—unquestionably "adjudicated fewer than all of the claims" (in the words of Fed.R.Civ.P. ("Rule") 54(b)).

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[16] In reaching our conclusions, we are in substantial agreement with the position taken by the EEOC as *amicus*. The EEOC takes no position as to whether the equal benefit or equal cost standard is satisfied in this case. *See* EEOC's br. at 12 n. 4.

In that circumstance Rule 54(b) could not be more clear: As a matter of law, the district court decision did "*not* terminate the action as to *any* of the claims . . ." (emphasis added). And that of course means that in the same plain language, the district court's ruling on the federal ADEA claim did not terminate that claim either. With the exception of some outliers, the strong trend in the case law everywhere is to recognize, as Rule 54(b) teaches, that an attempted appeal from such a partially dispositive order (absent an express Rule 54(b) determination and direction by the district court, which was neither sought nor granted here) is invalid because the order below was not a final judgment.

Authorities so holding are so numerous as scarcely to require citation, but *see*, *e.g.*, the thoughtful opinions from my own home circuit in *West v. Macht*, 197 F.3d 1185, 1188-90 (7th Cir.1999); *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 776 (7th Cir.1999); and the circuit's more extended treatment in *Horwitz v. Alloy Automotive Co.*, 957 F.2d 1431 (7th Cir.1992). More generally, the subject has been addressed at length—and by reaching the same conclusion of no final order, hence no appellate jurisdiction—by Professor Rebecca Cochran in *Gaining Appellate Review by "Manufacturing" a Final Judgment Through Voluntary Dismissal of Peripheral Claims*, 48 Mercer L.Rev. 979 (1997)(*see* especially *id.* at 1005-06).

But most significantly for present purposes, this Court has itself addressed the same problem and has expressly held that no appellate jurisdiction existed where (as in this case) plaintiffs had reserved the opportunity to revive the nonappealed claims that had been dismissed without prejudice. That was both the square holding and the language of *Tiernan v. Devoe*, 923 F.2d 1024, 1031 (3d Cir. 1991)(emphasis added, and citing the earlier decisions in *Fassett v. Delta Kappa Epsilon (New York)*, 807 F.2d 1150

(3d Cir.1986) and *Ingersoll-Rand Fin. Corp. v. Callison*, 844 F.2d 133, 135 n. 1 (3d Cir.1988)):

> As a preliminary matter we must establish whether we have appellate jurisdiction. This is an appeal from the district court's enforcement of settlement agreements purportedly entered into between plaintiffs and three out of four groups of defendants. Before this appeal was filed the claims against the remaining defendant group, the Devoe Defendants, were dismissed; but this dismissal was, for some of the plaintiffs, without prejudice. *Some plaintiffs retained the ability to reinstitute part of this litigation. Thus, at the time this appeal was filed, jurisdiction under 28 U.S.C. § 1291 was lacking.*
>
> That defect has since been cured. Several months after this appeal was filed, plaintiffs renounced, through letter briefs, any intention to take further action against the Devoe Defendants. Therefore, we now have jurisdiction over this appeal.

And *Fassett* (which was followed in Ingersoll Rand) plainly stands for the same proposition, for there the panel opinion upheld appealability only because the plaintiff had both "voluntarily and *finally* abandoned" the claims that were dismissed "*nominally* without prejudice," thus making the dismissal "for our purposes a final dismissal" (*Fassett*, 807 F.2d at 1155 (emphasis added in each instance)).[1]

As against those direct holdings in this Circuit and the like wealth of authority elsewhere, the majority opinion cites only to *Nyhuis v. Reno*, 204 F.3d 65, 68 n. 2 (3d Cir.2000) and *Bhatla v. U.S. Capital Corp.*, 990 F.2d 780, 786 (3d

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[1] Judge Adams' dissent in *Fassett*, *id.* at 1166-67 would not have granted finality even to a without-prejudice dismissal of a claim on which the statute of limitations had run.

Cir.1993). But *Nyhuis* dealt with a situation much different from the multiple claim situation that we have here-and by sharp contrast, the deliberate choice that has been made by appellants' counsel as to Count 2 in this case scotches the very notion that the "without prejudice" description was "anomalous," as the panel found to be the case in *Nyhuis*, 204 F.3d at 68 n. 2. Indeed, I submit that a full reading of the cited footnote supports the conclusion reached here, not that reached in the majority opinion. As for *Bhatla*, I suggest that a reading of that opinion makes it surprising to see the decision cited in support of, rather than in opposition to, the majority's stance.[2]

Nor does even one of the parade of citations that follow in the majority opinion add a whit to the analysis.[3] Without exception, each of those cases (even as disclosed by the majority's summary of their holdings) deals with the totally

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[2] *Bhatla's* holding of nonfinality, and hence of nonappealability and the lack of appellate jurisdiction, rests directly on the appellants' retained freedom to pursue the claims that they dismissed without prejudice (directly paralleling the situation here).

[3] Indeed, the first of the cases cited to exemplify the insupportable "we have always done it this way" premise—*Reitz v. County of Bucks*, 125 F.3d 139, 143, 148 (3d Cir.1997)—says not a word on the subject of jurisdiction or its absence. Just as Socrates is quoted in Plato's *Apology* as teaching that "the unexamined life is not worth living," just so the unexamined decision is not worth citing. And in jurisprudential rather than philosophical terms, no less an authority than the Supreme Court has consistently taught that no weight is to be attached to such an unexamined holding—a principle that dates back to Chief Justice Marshall (*United States v. More*, 7 U.S. (3 Cranch) 159, 172, 2 L.Ed. 397 (1805), that has survived the two intervening centuries (*see, e.g., United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 & n. 9, 73 S.Ct. 67, 97 L.Ed. 54 (1952)), and that is still alive and well and living in Washington (*see, e.g., Lopez v. Monterey County*, 525 U.S. 266, 281, 119 S.Ct. 693, 142 L.Ed.2d 728 (1999), reconfirming the comparable holding in *Brecht v. Abrahamson*, 507 U.S. 619, 630-31, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)).

different situation in which the *court* made the ultimate decision to dispatch all of the claims in the action--for example, by the remand of a case in its entirety to the state court or by a without-prejudice dismissal or remand to the state court of unresolved claims under the authority of 28 U.S.C. § 1367(a)(3) or under the long-standing doctrine of *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).[4]

Again the contrast with the present situation is clear: Here the litigant—given the opportunity to clean up its act in jurisdictional terms—chose to relinquish its other federal claim with prejudice but also expressly chose to preserve its state law claim, so that the district court's substantive resolution of the federal claim had "adjudicate[d] fewer than all the claims" (again to quote Rule 54(b)). It is thus surprising to find the majority opinion in part calling to its aid the decision in *Trent v. Dial Med. of Florida, Inc.*, 33 F.3d 217, 220 (3d Cir.1994), for the language quoted by the majority tellingly stops short of the opinion's statement that directly pointed to the square holding in Tiernan that makes the very distinction that controls here (emphasis added):

> Even dismissals without prejudice have been held to be final and appealable if they "end[ ][the] suit so far as the District Court was concerned," *although we have indicated that such dismissals may not constitute final orders until the party seeking relief renounces any*

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[4] In such a situation the Court of Appeals, if it reverses a district court's substantive decision that dismissed any claims that had been resolved at that initial level, may itself choose to reinvigorate other claims that had been dismissed without prejudice (*see* 28 U.S.C. § 2106, which empowers a reviewing court's remand order to "direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances"). That of course contrasts with any notion of a comparable power of self-determination on a litigant's part.

intention to reinstate litigation. See Tiernan v. Devoe, 923 F.2d 1024, 1031 (3d Cir.1991).

In sum, it is truly a non sequitur for the majority to conclude (in its opinion at 13) that "we have jurisdiction under 28 U.S.C. § 1291" by reason of the appellants' with-prejudice withdrawal of "any ADEA claim not disposed of by the district court's September 30, 1999 order," while at the same time appellants' selfsame letter has reconfirmed the *nonwithdrawal* of their Count 2 state law claim. Just the opposite is true. And to support that opposite conclusion, we have square precedents from this Circuit as well as elsewhere, as against the total absence of even a single Third Circuit case that deals with the present situation and nevertheless upholds appellate jurisdiction.

With respect, it seems to me that the majority opinion's treatment of this vital issue, running counter as it does to the only Third Circuit decisions that deal directly with the subject, also runs counter to the notion that no panel is free to depart from prior circuit law. But that aside, nothing in the majority opinion appears to respond to the heavy weight of authority that teaches the lack of finality, and therefore of appellate jurisdiction, under the circumstances presented here.

I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT,
W.D. PENNSYLVANIA,
ERIE DIVISION

Civil Action No. 98-272

ERIE COUNTY RETIREES ASSOCIATION
and Lyman H. Cohen, for himself and all
others similarly situated,

Plaintiffs,

v.

The COUNTY OF ERIE PENNSYLVANIA
and Erie County Employees' Retirement Board,

Defendants.

Sept. 30, 1999

MEMORANDUM OPINION

McLAUGHLIN, District Judge.

Plaintiffs, the Erie County Retirees' Association and Lyman H. Cohen, filed this action on behalf of Mr. Cohen and all other similarly situated former employees of the County of Erie, Pennsylvania, ages 65 and older, who are receiving health insurance coverage from the County under the Highmark "SecurityBlue" health insurance plan. Plaintiffs contend that the County violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, when it required Plaintiffs to either accept coverage under the SecurityBlue Plan or forego health insurance coverage from the County altogether. Plaintiffs commenced this action by filing a two-count complaint which asserts claims under both the ADEA and various state law theories of liability.

Presently pending before the Court are the parties' cross-motions for partial summary judgment on the ADEA claim.[1] Jurisdiction over this action is being exercised pursuant to 28 U.S.C. §§ 1331 and 1367(a). Because we conclude that the ADEA does not provide the specific protection sought by Plaintiffs, we will deny Plaintiffs' motion and grant partial summary judgment in favor of the Defendant.

I. BACKGROUND

Plaintiffs in this action are a class of retired employees of the County of Erie, ages 65 and older (and their spouses), who are currently receiving health insurance benefits from the County under Highmark's SecurityBlue health insurance plan. The gravamen of the complaint is that, because of their age, the Plaintiffs have been treated adversely with respect to their health insurance coverage as compared to those retirees under the age of 65. For purposes of context, we provide some background facts.

Effective January 1, 1972, the County implemented an official policy whereby persons employed by the County for at least 8 years would be entitled to hospitalization insurance benefits throughout their retirement. The policy was a change from the County's previous practice of providing hospitalization benefits only to active employees.

Beginning in 1987, the County began purchasing insurance coverage from Blue Cross/Blue Shield of Western Pennsylvania, now known as "Highmark Blue Cross/Blue Shield." Historically, health care benefits were provided to both active employees and eligible former employees through one of at least three different coverage "groups": the "00" group, consisting of current employees; the "01" group, consisting of "Medicare eligible" retirees; and the "02" group, consisting of "non-

[1] Although the Complaint names both the County and its Employees' Retirement Board as Defendants, for purposes of their instant motion Plaintiffs assert their ADEA claim only against the County.

Medicare eligible retirees." These groups had separate but similar traditional indemnity health insurance plans.

Due to the dramatic increase in the cost of health insurance which ensued over the years, the County Employees' Retirement Board (hereinafter, the "Board" or the "Retirement Board") later re-evaluated the extent to which it was willing to provide continued health insurance benefits to former employees. The Board determined on January 23,1992 that County employees hired after that date would not be eligible to receive any hospitalization benefits upon retirement. All of the class members in this action were hired prior to the January 1992 cut-off date and so remained eligible to receive retirement health benefits.

The Board further restricted eligibility for such benefits in a vote taken on December 12, 1995. On that date, the Board reaffirmed its decision that no employees hired after January 23, 1992 would be eligible for hospitalization benefits upon retirement. In addition, with respect to those employees (like Plaintiffs) hired prior to January 23, 1992, the Board determined that eligibility for such benefits would be restricted to the following groups:

> (a) employees who were unable to continue as County employees due to a disability and who would otherwise be eligible for a disability retirement pension under the County Pension Code;
>
> (b) employees who retired from the County government after having accumulated at least 20 years of service with the County and were 55 years of age;
>
> (c) employees who were involuntarily terminated from County government after having accumulated at least 8 years of service with the County; and
>
> (d) employees who retired from the County after having accumulated at least 8 years of service with the County and were 60 years of age.

All of the class members remained eligible for retirement benefits under these restrictions.

Up until October 1997, the entity primarily responsible for selecting health insurance programs for eligible retirees was the Retirement Board. Premiums for retiree insurance coverage had been funded up to that point by the "excess interest" generated by the County's pension funds.[2] However, in 1997, a change in government accounting standards eliminated "excess interest" as a source of funding for retiree insurance coverage. Accordingly, beginning in 1998, retiree insurance coverage became part of the regular County budget and the County assumed responsibility for the selection of retiree health care plans.[3]

Meanwhile, since at least 1996, County officials had begun exploring ways to further reduce the cost of providing health insurance to its retirees and employees. By late 1997 officials from the County and its Retirement Board, having engaged in a review and evaluation of the relative costs and benefits of the existing health care plans, decided that the changes would be mandated in the health benefits provided to retirees. In November 1997, Highmark announced its intent to increase the County's annual premiums for medical insurance coverage by an average of 48 percent. The prospect of this significant increase in medical insurance premiums heightened the

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[2] "Excess interest" is the amount of income generated each year by the pension funds which is above and beyond the amount necessary to cover the pension obligations and legally mandated reserves.

[3] Plaintiffs contend that this change in accounting did not in any way affect the County's cost of providing health care benefits or its decision to alter Plaintiffs' benefits. According to Plaintiffs, the monies that had formerly been characterized as "excess income," although no longer designated as such, are still available to the County and are used to offset the County's annual contribution to the retirement fund. To the extent there is any genuine dispute on this point, it is immaterial to our resolution of the instant motions.

perceived need for a re-evaluation of existing health insurance options.

Accordingly, in the Fall of 1997, the County determined that, effective February 1, 1998, it would provide coverage under the "SecurityBlue" Plan to all former employees of the County who were eligible for continuing benefits and who qualified for coverage under the SecurityBlue Plan. Essentially, these former employees had to either accept coverage under the SecurityBlue Plan or forego any retirement health insurance benefits from the County.

SecurityBlue is a coordinated health care plan provided through Keystone Health Plan West, Inc., a federally qualified health maintenance organization ("HMO"), and a contract with Medicare. SecurityBlue is available to persons who have Medicare Part B Medical Insurance and who live in the SecurityBlue "service area."[4] This Plan differs from a traditional indemnity plan primarily in that the health care needs of each member are coordinated by his or her primary care physician ("PCP"), who is selected from a list of physicians provided in the SecurityBlue Provider directory. The PCP is responsible not only for administering care, but also for making referrals to specialists and arranging for hospitalization. Some degree of individual choice is lost under this Plan inasmuch as a member's PCP must be selected from a list of physicians within the SecurityBlue network and coverage is available only for services provided or authorized by the insured's PCP. In most cases, the SecurityBlue Plan does not pay for services that are not authorized by the insured's PCP.[5] The trade-off for this loss

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[4] The SecurityBlue service area covers most of Western Pennsylvania and includes the following counties: Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Erie, Fayette, Greene, Indiana, Lawrence, Mercer, Somerset, Washington and Westmoreland.

[5] The Plan makes an exception in the case of "emergencies and urgently needed care outside the service area." (Append. in Supp. of Pl.s' Mot. for Summ. Judg. [Doc. No. 18] at 78.)

of choice is that, unlike the traditional indemnity plan, the SecurityBlue Plan has no deductibles and little or no co-payment obligation; generally, 100 percent of the covered services are paid for.[6] In addition, SecurityBlue covers pre-existing conditions without a waiting period and also provides benefits for some services—such as eye examinations, dental visits and hearing aids—that are not available under traditional indemnity plans or Highmark's SelectBlue point- of-service plan (discussed below). However, SecurityBlue members must continue to pay Medicare Part B Medical Insurance premiums.

Despite the change in health care benefits for those retirees eligible under the SecurityBlue Plan, the County did not immediately alter the benefits available to its other retirees. For example, former employees still residing in Western Pennsylvania who were not Medicare eligible, and therefore not eligible for SecurityBlue coverage, continued to receive health insurance benefits under the old traditional indemnity plan until October 1, 1998, when they began receiving coverage under the Highmark "SelectBlue" Plan. The SelectBlue Plan differs from SecurityBlue in that it is a hybrid "point-of- service" plan which combines the features of an HMO with those of a traditional indemnity plan. Under SelectBlue an insured can, for any health care incident, select either the HMO option (and accept its benefits and limitations) or the traditional indemnity option. In order to be eligible for SelectBlue, a retiree must be non-eligible for Medicare and must live in the SelectBlue service area.

Plaintiffs maintain that they have been discriminated against in violation of the ADEA as compared to retirees under the age of 65 who, Plaintiffs claim, have received superior health care coverage. This argument actually involves comparison of the two groups with respect to two different time periods: (a) February 1, 1998 to October 1, 1998; and (b) October 1, 1998 to

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[6] For some services, a $10.00 co-payment is required under SecurityBlue.

present. With respect to the first period, Plaintiffs claim they received inferior health care coverage because they were essentially forced to accept coverage under the SecurityBlue Plan, while retirees under the age of 65 continued to receive coverage under the traditional indemnity insurance plan. With respect to the second time period, Plaintiffs contend that their health cafe insurance coverage under the SecurityBlue Plan was inferior to that offered younger retirees under the SelectBlue Plan.

II. STANDARD OF REVIEW

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In order to withstand a motion for summary judgment, the non-moving party must "make a showing sufficient to establish the existence of [each] element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In evaluating whether the non-moving party has established each necessary element, the Court must grant all reasonable inferences from the evidence to the non-moving party. *Knabe v. Boury Corp.*, 114 F.3d 407, 410, n. 4 (3d Cir.1997) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). "Where the record taken as a whole could not lead a reasonable trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Id. (quoting *Matsushita*, 475 U.S. at 587, 106 S.Ct. 1348).

III. DISCUSSION

The ADEA broadly proscribes age-based discrimination in employment by (among other things) making it unlawful for any employer:

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C.A. § 623(a) (West 1999).

Plaintiffs contend that the County violated the ADEA by maintaining a facially discriminatory policy whereby Plaintiffs were offered an inferior health insurance plan on account of their age. Plaintiffs further posit that the County's health insurance policy fails to comply with the requirements of the Older Workers Benefit Protection Act of 1990 ("OWBPA"), which, *inter alia*, amended Section 4(f)(2) of the ADEA, 29 U.S.C.A. § 623(f)(2) (West 1999).

As it relates to employee benefit plans, § 4(f)(2) currently provides that it "shall not be unlawful for an employer"

> (2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—
>
> * * * * * *
>
> (B) to observe the terms of a bona fide employee benefit plan—
>
> (i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under [29 C.F.R. § 1625.10] . . .

29 U.S.C.A. § 623(f)(2)(B)(i) (West 1999). The purpose behind § 4(f)(2) is "to permit age-based reductions in employee benefit

plans where such reductions are justified by significant cost considerations." 29 C.F.R. § 1625.10(a)(1) (1998). In such cases:

> benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage.

Id. Section 4(f)(2)(B)(i) of the ADEA in its present form specifically codifies this "equal cost/ equal benefit" rule. 29 U.S.C.A. § 623(f)(2)(B)(i) (West 1999).

At this point, it is important to clarify the nature of the Plaintiffs' claims. In their complaint, Plaintiffs allege they are being treated adversely on account of their age as compared to both (a) younger (i.e., under age 65) retirees *and* (b) active employees of the County. However, for purposes of their motion for summary judgment, Plaintiffs are *not* presently challenging the disparity in County-provided health insurance benefits as between *active and retired* employees. Instead, for purposes of their instant motion, Plaintiffs ask the Court to focus only on the group of retirees eligible for continued health insurance benefits under the Board's December 12, 1995 resolution.[7] As to that group, Plaintiffs contend that the County has violated the OWBPA because, under the SecurityBlue plan, the County is actually spending less on health insurance benefits for older retirees and, at the same time, providing them an inferior health insurance plan. The County has essentially

[7] Henceforth in this opinion, when the Court discusses health insurance benefits as they relate to former County employees, it will implicitly be referring to those County retirees who were eligible for continued health insurance coverage under the December 12, 1995 resolution.

confined its response to the issues raised in the Plaintiffs' motion for summary judgment. We will likewise limit our focus to the alleged disparity being accorded to the two groups of retirees.[8]

That having been said, the County contends that its policy does not implicate the ADEA, as amended by the OWBPA. According to the County, its decision to place Plaintiffs in SecurityBlue was based not on age, but rather, on consideration of three factors: (1) the insured's status as active or inactive; (2) cost; and (3) the availability of plans. Thus, a threshold challenge is raised by the County as to whether the Plaintiffs have even made out a prima facie case under the ADEA.

We must first attempt to clarify what the County's "policy" actually was concerning its placement of individuals into the various health plans. Plaintiffs suggest it was the County's policy to segregate former employees, ages 65 and older, and essentially force them to either take health care coverage under the SecurityBlue Plan or forego County-provided coverage altogether. Yet it is undisputed that the triggering feature for SecurityBlue coverage was, and is, eligibility for Medicare Part B Medical Insurance, coupled with the proviso that the insured must reside in the SecurityBlue service area. While age is one factor that triggers eligibility for Medicare coverage, it is not the only one, because individuals may be eligible for Medicare if they are disabled. In fact, the record shows that at least some retirees under the age of 65 were placed in the SecurityBlue Plan on account of their disability, not their age. The County also notes that Medicare-eligible retirees residing outside of the SecurityBlue service area are not eligible for SecurityBlue, and therefore remain covered under the former traditional indemnity plan.

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[8] Accordingly, the Court's ruling in this Memorandum Opinion and Order does not attempt to resolve any remaining aspect of the Plaintiffs' ADEA claim.

We conclude that there is no genuinely disputed issue of fact as to the nature of the County's policy of providing health care benefits to its former employees. The undisputed evidence shows that former employees who were eligible for continuing health care coverage under the terms of the Retirement Board's December 12, 1995 resolution were offered coverage under the least expensive plan (that is, least expensive to the County) for which they qualified. Consequently, retirees who were Medicare-eligible were placed in SecurityBlue if they lived in the applicable service area. Those retirees who lived in the SelectBlue service area but who were not Medicare-eligible (either by virtue of age or disability) were placed in SelectBlue. Those retirees who did not qualify for SecurityBlue or SelectBlue (e.g., those who maintain residence outside of Western Pennsylvania) were offered health insurance under the traditional indemnity plan.

Based on these undisputed facts, the County contends that its policy does not implicate the ADEA at all. In short, the County asserts that age was not a determinative factor in its decision as to what health plans would be offered to its current and former employees. To the extent the ADEA is implicated here, the County asserts the Act's affirmative defense which applies where adverse employment decisions are based on "reasonable factors other than age." *See* 29 U.S.C.A. § 623(f)(1) (West 1999).

Is the ADEA Implicated?

In arguing that Plaintiffs have failed to make a *prima facie* showing of an age-based employment action, the County relies chiefly on the Supreme Court's decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993). In *Hazen*, the plaintiff was a 62-year old technical director of a paper company who was fired by his employer just several weeks shy of the date on which his pension benefits would have vested. The company had a policy under which benefits vested after an employee accrued 10 years of service. The Supreme

Court held that the employer's deliberate effort to interfere with Mr. Biggins's pension by firing him shortly before his benefits vested—although a violation of ERISA—was not a violation of the ADEA. 507 U.S. at 609, 612-13, 113 S.Ct. 1701. The Court observed that, while age and an individual's years of service may be correlated to a degree, they were analytically distinct from one another because a younger individual who remained with the same employer could vest after 10 years of service while a newly hired older worker with fewer years of service might not be vested. *Id.* at 611, 113 S.Ct. 1701. The Supreme Court emphasized in Hazen Paper that the ADEA is not violated when a decision is wholly motivated by factors other than age. I*d.*

The County also relies on *Bramble v. American Postal Workers Union, AFL-CIO Providence Local*, 135 F.3d 21 (1st Cir.1998). That case involved a claim by the president of a local office of the American Postal Workers Union that the Union had violated the ADEA when it reduced his salary based on his status as a non-active postal employee. In *Bramble*, the Union had amended its constitution and revised the salary structure for the union presidency from a fixed rate to a rate that was tied to the president's salary as an active employee. In accordance with this policy, Dale Bramble, having taken an early retirement from his job as a postal worker, was entitled to receive only a $3,000.00 stipend as union president, whereas a worker on "active" status and serving as union president would have received the $3,000 plus his or her full salary. The First Circuit held, based on the ruling in *Hazen Paper*, that the Union's policy did not violate the ADEA, since the distinguishing characteristic at issue was "non-active status"—a factor analytically distinct from age, and one which included individuals other than retirees. The court observed that "[w]hile retired postal workers likely outnumber those postal workers on disability or unpaid leave, the fact remains that the group negatively affected by the active pay status policy is

'analytically distinct' from the group of retirement aged postal employees. In other words, there is a positive correlation between active pay status and age, but one is not an exact proxy for the other." 135 F.3d at 26.

Having examined the foregoing authority, this Court is not persuaded that *Hazen* and *Bramble* control the outcome of this action. Those cases involved decisions based on factors (viz., years of service and inactive status) that were clearly analytically distinct from (although correlated to) age. Here, however, when we focus on the disparate treatment as between Plaintiffs and the other County retirees, the distinction becomes far less clear. Medicare eligibility and residency within the SecurityBlue service area are both necessary—i.e., "but for"—conditions for receiving coverage under the SecurityBlue plan. To the Court's knowledge, none of the Plaintiffs are disabled so as to be independently eligible for Medicare on that basis. Rather, for the Plaintiffs, eligibility for Medicare followed ineluctably upon attaining age 65. Plaintiffs' age was a determinative factor in their placement in the SecurityBlue Plan because, if not for their age, they would not be placed in that plan. The non-age factors at issue in *Hazen* and *Bramble*, therefore, are distinguishable.

Moreover, extending the rulings of *Hazen* and *Bramble* to this case would require this Court to essentially hold that discrimination in benefits based on an individual's eligibility for Medicare is not an age-related distinction. That is problematic, in the Court's view, because the established law under the ADEA suggests that both Congress and the EEOC felt otherwise. Section 1625.10 of Title 29, Code of Federal Regulations—which is now specifically incorporated into § 4(f)(2)(B)(i) of the ADEA—contains a special provision establishing the narrow conditions under which an employer may comply with the "equal cost/equal benefit" rule while coordinating employee benefits with government provided benefits such as Medicare:

> [a]n employer does not violate the Act by permitting certain benefits to be provided by the Government, *even though the availability of such benefits may be based on age. For example, it is not necessary for an employer to provide health benefits which are otherwise provided to certain employees by Medicare.* However, the availability of benefits from the Government will not justify a reduction in employer-provided benefits if the result is that, taking the employer-provided and Government-provided benefits together, an older employee is entitled to a lesser benefit of any type (including coverage for family and/or dependents) than a similarly situated younger employee. *For example, the availability of certain benefits to an older employee under Medicare will not justify denying an older employee a benefit which is provided to younger employees and is not provided to the older employee by Medicare.*

20 C.F.R. § 1625.10(e) (1998) (emphasis supplied). The highlighted language suggests that Medicare is considered an age-based factor under the regulation, at least where eligibility for Medicare benefits is based on the individual's age. In essence, the regulation indicates that an employer will run afoul of the ADEA if the employer provides a "lesser benefit of any type" (i.e., a form of disparate treatment) to a Medicare-eligible employee in the course of coordinating the employee's Medicare benefits with other, employer- provided benefits.[9] In such a scenario, the distinguishing characteristic giving rise to the disparate treatment would be the employee's status as a Medicare beneficiary. Section 1625.10(e) thus suggests that Medicare eligibility, when based on a recipient's age, is an age-based factor which implicates the ADEA.[10] We therefore reject

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[9] In light of our ruling, we would interpret this regulation as applying only to active employees where the issue of health benefits is concerned.

[10] Our conclusion is not changed by the fact that Plaintiffs, in order to be eligible for SecurityBlue, had to maintain residence in the SecurityBlue

the Defendant's suggestion that Plaintiffs have not made a prima facie showing of age-based discrimination.

Does the Older Worker's Benefit Protection Act Apply to Plaintiffs?

Having concluded that the ADEA is at least facially relevant here, we must next consider whether either of the parties is entitled to summary judgment under the Act. Plaintiffs contend that the County violated the ADEA by failing to offer retirement health plans which adhere to the "equal cost/equal benefit" rule as set forth in 29 U.S.C.A. § 623(f)(2)(B)(i) and 29 C.F.R. § 1625.10(a)(1). The County asserts that it is entitled to judgment under § 623(f)(1), which provides an affirmative defense where the subject employment action is based on "reasonable factors other than age." *See* 29 U.S.C.A. § 623(f)(1) (West 1999).[11] Alternatively, to the extent that § 623(f)(2)(B)(i) is applicable, the County argues that it has satisfied the requirements of that provision. The County also disputes Plaintiffs' characterization of the SecurityBlue Plan as inferior and claims that, in any event, the County was powerless, in light of Highmark's underwriting criteria, to offer Plaintiffs the health plan alternatives they desire. Finally, the County argues that, from a policy perspective, Plaintiffs' theory of liability would lead to widespread and severe problems such that judgment in favor of the defense is warranted. We conclude that the County

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service area. Both factors (age-based Medicare eligibility and residence) are necessary, or but-for, factors. Therefore, both factors had a determinative influence on the Plaintiffs' allegedly adverse treatment. Also of no moment is the fact that Plaintiffs had to be within the select group of retirees eligible for continuing benefits under the Board's January 23, 1992 and December 12, 1995 resolutions. For present purposes, we are comparing only the allegedly disparate treatment being meted out *within* the group of retirees who were eligible for continuing health benefits under 1992 and 1995 resolutions.

[11] In light of our conclusion that the Plaintiffs' eligibility for Medicare is an age-based factor, we would likely find this defense inapplicable as a matter of law.

is ultimately entitled to judgment for a different reason: to wit, assuming arguendo that the SecurityBlue Plan provides Plaintiffs with lesser benefits than are provided to younger retirees (an issue which we need not and do not decide), this alleged disparity is not the type of discrimination which was meant to be prohibited by § 4(f)(2)(B)(i) of the ADEA, as amended by the Older Workers Benefit Protection Act.

Before expounding on this issue, however, some brief commentary is warranted regarding the procedural posture of this case. In its initial summary judgment brief, the County indicated, without further elaboration, that it "disputes that retirees are 'individuals' within the meaning of [29 U.S.C.] Section 623(a)(1)." (Br. of Def. in Opp. to Pl.s' Mot. for Partial Summ. Judg. and in Supp. of the County's Cross-Mot. for Summ. Judg. [Doc. No. 27] at 24 n. 12.)[12] The County also disputed the applicability of 29 U.S.C. § 623(f)(2)(B)(i) to retirees. (*Id.* at 27 n. 14.) The Court did not initially focus its attention on these issues. Nevertheless, in the course of researching the merits of the parties' arguments (and attempting to better understand the intended application of § 4(f)(2)(B)(i) of the ADEA), the Court came across legislative history suggesting that, in fact, retired persons were not entitled to relief under the Act, at least for purposes of challenging any disparities in their retirement health benefits. The Court therefore raised this issue with the parties *sua sponte* and invited further briefing on the issue of whether Plaintiffs, as retired persons, were entitled to protection under the ADEA. Having considered the parties' respective arguments and, in addition, having conducted significant independent research, the Court concludes that Plaintiffs are not entitled under the ADEA to the relief they now

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[12] This defense was also raised in the County's answer. (*See* Def.'s Answer [Doc. No. 15] at ¶ 56.)

seek.[13] We arrive at this conclusion based on consideration of several factors.

1. The Language of the ADEA

We begin by considering the statutory language itself. "Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). Whether the meaning of a statutory provision is plain or ambiguous is determined by "reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341, 117 S.Ct. 843. We must interpret the Act "in a manner which best effectuates Congressional intent and the legislative purpose underlying its adoption." *In re Jaritz Indus., Ltd.*, 151 F.3d 93, 105 (3d Cir.1998) (Mansmann, J., concurring).

The relevant portions of the ADEA for present purposes are § 4(a)(1) and § 4(f)(2)(B)(i). Subsection 4(a)(1) generally prohibits employers from discriminating against "any individual" with respect to the individual's compensation, terms, conditions, or privileges of employment, including employee benefits. 29 U.S.C.A. § 623(a)(1) and § 630(l) (West 1999). Under § 4(f)(2)(B)(i), however, a limited exception is provided under which an employer may justify age-based disparities in employee benefit plans based on cost factors. Under this limited exception, an employer may distinguish between "older workers" and "younger workers" in terms of the employee benefits offered, "where, for each benefit or benefit

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[13] The Court notes in hindsight that the question might have been better phrased in terms of whether retiree health benefits are the type of benefits meant to be protected under § 623(a)(1) and (f)(2)(B)(i). Nevertheless, the issue was sufficiently joined by the parties for purposes of our disposing of the pending motions. In their initial and supplemental briefs, the parties located and discussed many (though not all) of the points on which the Court's instant ruling is based.

package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)." *See id.* § 623(f)(2)(B)(i). Plaintiffs, of course, contend that their ADEA rights were violated by the County's failure to abide by this limited "equal cost/equal benefit" exception. Thus, the narrow question we must address is whether § 4(f)(2)(B)(i) of the ADEA provides protection to retired persons, like Plaintiffs, who seek to challenge the disparities provided by employers in retiree health benefits.

Notably, § 4(f)(2)(B)(i) refers to "older workers" and "younger workers," terms that, although undefined in the ADEA, suggest a more narrow and precise scope of protection. Congress did not use in § 4(f)(2)(B)(i) the broader term "employees," cf. 29 U.S.C.A. § 623(a)(2), which has been held, in the context of Title VII's anti-retaliation provision, to encompass *former* employees. *See, e.g., Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (discharged employee, who had previously filed a complaint with the EEOC based on alleged racial discrimination in connection with his termination, could bring retaliation claim under § 704(a) of Title VII against his former employer, based on allegations that former employer had interfered with employee's prospective employment opportunities in retaliation for having filed the EEOC charge). Nor did Congress choose to employ the broader and more generic term "individual" in § 4(f)(2)(B)(i). *Cf.* 29 U.S.C.A. § 623(a)(1).

The statutory language thus seems to present somewhat of an anomaly. "Individuals" are broadly protected against discrimination in terms of their employee benefits. However, employers may, consistent with the equal cost/equal benefit principle, engage in limited forms of age-based discrimination as against "older workers." In order to succeed under the theory they are advancing, Plaintiffs must be both "individuals" and

"older workers"—terms which are not defined by the statute.[14] Because the precise application of these provisions is not clear from the statutory language itself, we must look to the broader context and purpose of the Act for guidance.

2. *The Legislative History*

Examination of the legislative history suggests that the 1990 amendments to the ADEA were not intended to extend the protection now being sought. For purposes of context, we review the circumstances under which the Older Workers Benefit Protection Act was passed.

With the passage of the ADEA in 1967, Congress "broadly prohibit[ed] arbitrary discrimination in the workplace based on age." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985). As originally enacted, § 4(f)(2) provided a narrow exception under which it would not be unlawful for employers "to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [the Act]." Pub.L. 90-202, § 4, Dec. 15, 1967, 81 Stat. 603, *codified at* 29 U.S.C. § 623(f)(2) (1967). This specific exception was designed to ensure that employees were not discouraged from hiring older workers due to the increased costs involved in providing certain types of benefits to them. *See* S.Rep. No. 101-263, 101st Cong., 2nd Sess, 1990 (April 5, 1990) at pp. 6-8 (discussing legislative history), *reprinted in* 1990 U.S.C.C.A.N. (104 Stat. 978) pp. 1511-1512.

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[14] We would reject any interpretation of the ADEA under which Plaintiffs would claim to be "individuals"—and thus entitled to the broad protection of § 4(a)(1)—but not "older workers" subject to the limited "equal cost/equal benefit" defense of § 4(f)(2)(B)(i). Under such an interpretation, retirees like Plaintiffs would receive greater protection under the ADEA than active employees. This is a result which, in our view, could not have been intended under the Act.

Following the ADEA's enactment, the Department of Labor (which at that time had responsibility for enforcement of the Act) issued a regulation implementing § 4(f)(2). *See* 34 Fed.Reg. 9709 (June 21, 1969), *codified at* 29 C.F.R. § 860.120(a) (1970).[15] The regulation articulated the rule which became known as the "equal benefit or equal cost" principle. It provided that "[a] retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage." *Id.* Though the regulation underwent various permutations, the "equal cost/ equal benefit rule" remained in effect as the basic interpretation of § 4(f)(2).

A. *Public Employees Retirement Sys. of Ohio v. Betts*

In 1989, the Supreme Court issued its decision in *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989), and held that § 4(f)(2) exempts all provisions of bona fide employee benefit plans from regulation under the ADEA, except where the plan is a subterfuge for discrimination in a non-fringe-benefit aspect of employment. The plaintiff, June Betts, was a speech pathologist employed by the Hamilton County Board of Mental Retardation and Developmental Disabilities. As a public agency employee, Betts received retirement benefits through the Public Employees Retirement System of Ohio (PERS). Under the PERS statutory scheme, two forms of monthly retirement benefits were available to public employees upon termination of their employment: (a) age-and-service retirement benefits and (b) disability retirement benefits. The latter type of benefits were

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[15] The regulation has since been recodified at 29 C.F.R. § 1625.10, and authority for its enforcement has been transferred to the Equal Employment Opportunity Commission.

available only to employees who suffered a permanent disability, had at least five years of total service credit, and were under the age of 60 at the time of their retirement. Once an individual retired on either age-and-service benefits or disability retirement benefits, he or she continued to receive that type of benefit throughout retirement, regardless of age. In 1976, the PERS statutory scheme had been amended to provide that disability retirement payments would in no event constitute less than 30 percent of the disabled retiree's final average salary. However, no such floor applied in the case of employees receiving age-and-service retirement benefits.

In 1984 Betts, having become unable to perform her job adequately on account of Alzheimer's Disease, was reassigned to a less demanding position. In May of 1985, at the age of 61, she retired because she was no longer able to perform adequately in any employment capacity. Although Betts received age-and-service retirement benefits, her retirement at age 61 rendered her ineligible for disability retirement benefits under the PERS statutory scheme. This meant that Betts received benefits in the amount of $158.50 per month under the age-and-service retirement plan, as opposed to the $355 per month that she would have received had she been eligible for disability retirement benefits.

Betts filed suit against PERS, claiming that PERS's refusal to grant her application for disability retirement benefits violated the ADEA. The district court agreed and awarded summary judgment in favor of Betts. *See Betts v. Hamilton Cty. Bd. of Mental Retardation*, 631 F.Supp. 1198 (S.D.Ohio 1986). The district court determined that the PERS plan did not come within the § 4(f)(2) exemption because the loss of disability retirement benefits after age 60 was not justified by significant cost considerations. 631 F.Supp. at 1204. The Court of Appeals for the Sixth Circuit affirmed. *See Betts v. Hamilton Cty. Bd. of Mental Retardation and Developmental Disabilities*, 848 F.2d 692 (6th Cir.1988).

The Supreme Court reversed the judgment for Betts. Initially, the Court reaffirmed its prior interpretation of § 4(f)(2)'s "subterfuge" language as requiring a subjective intent on the part of the employer to evade the purposes of the ADEA. 492 U.S. at 171, 109 S.Ct. 2854 (citing *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203, 98 S.Ct. 444, 54 L.Ed.2d 402 (1977)). It rejected the EEOC's "equal cost/equal benefit" rule as inconsistent with the plain language of the statute, since the regulation did not appear to acknowledge a subjective intent element. 492 U.S. at 171-72, 109 S.Ct. 2854. The Court also did not agree that § 4(f)(2) could be construed so as to make the "equal cost/equal benefit" exception the exclusive means of escaping classification as a "subterfuge." *Id.* Instead, the Court interpreted the exemption of § 4(f)(2) broadly. It concluded that employee benefit plans were intended to be exempt from regulation under the Act "except to the extent plans were used as a subterfuge for age discrimination in other [non-fringe-benefit] aspects of the employment relation." 492 U.S. at 180, 109 S.Ct. 2854. The Court reversed the judgment in favor of Betts because it concluded that Betts had failed to prove that the reduction in benefits at age 60 was the result of an intent to discriminate in a non-fringe- benefit aspect of employment. *Id.* at 182, 109 S.Ct. 2854.

B. *The Older Worker's Benefit Protection Act*

In 1990, Congress responded to the *Betts* decision by passing the Older Workers Benefit Protection Act, Pub.L. 101-433, which, among other things, amended § 4(f)(2) of the Act to its present form and specifically overruled both the result and the reasoning of the *Betts* decision. This legislative action was necessary, it was felt, in order "to restore the original congressional intent in passing and amending the [ADEA], which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." Pub.L. 101-433, Title I, § 101, set forth in 136

CONG. REC. 25,350 (1990). The OWBPA amended the definitional section of the ADEA to clarify that employee benefits are included within the definition of "compensation, terms, conditions, or privileges of employment." Pub.L. 101-433 § 102, *as codified in* 29 U.S.C. § 630(l). In addition, the Act redrafted § 4(f)(2) of the ADEA by eliminating the "subterfuge" language and changing the provision to its present form. *Id.* at § 103(1), as codified in 29 U.S.C. § 623(f)(2). The OWBPA also expanded the safe harbors available to employers by creating a new provision under which employers would be permitted to make subsidized early retirement payments and/or Social Security "bridge" payments under a defined contribution plan. Id. at § 103(3), *codified in* 29 U.S.C. § 623(l)(1)(B). Employers were also allowed to engage in a type of benefit packaging not previously permitted under the ADEA—i.e., offsetting (in the case of a plant shutdown or layoff) an employee's severance benefits by the value of any pension sweeteners or retiree health benefits provided by the employer. *Id.* at § 103(3), *codified at* 29 U.S.C. § 623(l)(2)(A).

With respect to § 4(f)(2)(B)(i) of the ADEA, the OWBPA essentially codified the EEOC's articulation of the "equal cost/equal benefit" rule, as set forth in 29 C.F.R. § 1625.10 (1988). Pub.L. 101-433 § 103(1), *codified at* 29 U.S.C. § 623(f)(2)(B)(i). It also clarified, contrary to the ruling of *Betts*, that the "equal cost/equal benefit" exception was an affirmative defense for which the employer would bear the burden of proof. *Id.*, *codified at* 29 U.S.C. § 623(f)(2)(B).

Although retiree health benefits were not the primary focus of the Older Workers Benefit Protection Act, various aspects of the legislative history show that this issue was the subject of some concern. When the Senate version of the bill (S.1511) was originally reported out of the Senate Labor and Human Resources Committee in April of 1990, the Report contained the following passage:

> The Committee intends to approve the parallel practice of integrating retiree health benefits with Medicare, which is already permitted under the regulation. *See* 29 C.F.R. § 1625.10(e). The availability of Medicare benefits from the federal government will not justify a reduction in employer- provided retiree health benefits if the result is that, taking the employer-provided and government-provided benefits together, an older retiree is entitled to a lesser benefit of any type (including coverage for family and/or dependents) than a similarly situated younger retiree. *See id.*

S. Rep. 101-263 (April 5, 1990) at pp. 21-22, printed in 1990 U.S.C.C.A.N. p. 1527. This passage tends to support Plaintiffs' theory that the County was required to comply with the criteria of 29 C.F.R. § 1625.10(e), and the "equal cost/equal benefit" rule, in selecting and implementing the subject retirement health care plans. Nevertheless, subsequent legislative history indicates otherwise.

Both S. 1511 and a nearly identical House Bill (H.R.3200) were apparently held off the floor because of opposition. One of the issues which engendered concern was the issue of retiree health benefits. For example, during Senate debates held on September 18, 1990, Senator Grassley acknowledged his support for a bill that would address the problems created by the *Betts* decision. 136 CONG REC. 24,795 (1990). However, the Senator also wanted assurances that S. 1511 would not "create havoc in the benefits area." *Id.* Accordingly, Senator Grassley entered into the record a number of "major questions" to be addressed by the sponsors of S. 1511, including the following:

> 4. Some companies do provide health insurance coverage for retirees, but cease such insurance coverage when the retiree becomes eligible for Medicare. Thus, such companies would be spending more for their younger retirees, who are not eligible for Medicare, than for their older retirees, who are receiving Medicare.

> If the bill is enacted, would such a company be in violation of the law? Is that the sponsors [sic] intention? If not, what provision in the bill protects employers in such circumstances?

Id.

This concern was subsequently addressed during the course of proceedings held on September 24, 1990. On that date, the Senate voted to pass an amended version of S. 1511, which represented a compromise version as agreed to by the various managers, principally Senators Metzenbaum, Pryor, Hatch, and Heinz. One of the express compromise points was the decision to use the term "worker" in § 4(f)(2)(B)(i) of the ADEA, rather than the term "individual." *See* 136 CONG. REC. 25,355 (1990) (Ex. 1, "Summary of Pryor-Hatch-Metzenbaum-Heinz Agreement on Betts Legislation" at ¶ 8). The "Statement of Managers," which accompanied this final substitute bill, indicates that the managers sought to clarify and eliminate the existing controversy concerning the reduction of retiree medical benefits at Medicare-eligible age:

> RETIREE HEALTH
>
> Many employer-sponsored retiree medical plans provide medical coverage for retirees only until the retiree becomes eligible for Medicare. In many of these cases, where coverage is provided to retirees only until they attain Medicare eligibility, the value of the employer-provided retiree medical benefits exceeds the value of the retiree's Medicare benefits. Other employers provide medical coverage to retirees at a relatively high level until the retirees become eligible for Medicare and at a lower level thereafter. *In many of these cases, the value of the medical benefits that the retiree receives before becoming eligible for Medicare exceeds the total value of the retiree's Medicare benefits and the medical benefits that the employer provides after the retiree attains Medicare*

> *eligibility. These practices are not prohibited by this substitute.* Similarly, nothing in this substitute should be construed as authorizing a claim on behalf of a retiree on the basis that the actuarial value of employer-provided health benefits available to that retiree not yet eligible for Medicare is less than the actuarial value of the same benefits available to a younger retiree.

136 CONG. REC. 25,353 (1990) (emphasis supplied). Senator Hatch explained that this restriction was actually intended to protect retired persons by avoiding the creation of a regulation which might discourage employers from offering health benefits to their retirees:

> Many employers continue health benefits for persons who retire before they are eligible for Medicare and/or continue certain benefits that are supplemental to Medicare.
>
> This is a positive practice which helps provide important protections for retirees.
>
> *This compromise ensures that the bill will not interfere with these important benefits that are vital to retirees of all ages.*

Id. at 25,356 (emphasis supplied). Senator Hatch further explained that the compromise bill was intended to strike a balance between "protect[ing] older workers' rights to fair and equitable benefits" under the ADEA "without disrupting the variety of employer-sponsored policies that benefit all workers." *Id.* at 25,357. The Senator expounded on this point:

> It has been our policy to encourage employers to provide generous employee benefits. Clearly, this objective is frustrated, if not defeated, if Congress enacts legislation that so heavily encumbers American companies that they must reduce or eliminate such benefits.

* * * * * *

> We must be concerned about the impact on all employees of additional Federal requirements that unnecessarily complicate existing arrangements or that will shift a firm's resources from actual benefits into regulatory compliance or litigation.
>
> If an employer is forced to reduce or eliminate benefits for some workers to avoid litigation exposure or to avoid going afoul of the law, we have to ask the question: Is it worth it?

Id.

On October 2, 1990, the final substitute version of S. 1511 was presented in the House of Representatives. *See* 136 CONG. REC. 27,055 (1990). The Managers on the House side specifically adopted and incorporated into the record the Statement of the Senate Managers, including the Senate Managers' discussion of "Retiree Health," quoted *infra*. *See id.* at 27,061- 27,062. Thus, like the Senate Managers, the House Floor Managers were apparently of the view that employers would not run afoul of the ADEA by providing disparate health benefits as between their Medicare-eligible and non- Medicare-eligible retirees. If, as the Statement of Managers suggests, the ADEA does not prevent an employer from offering health benefits to retirees only up until the time of Medicare-eligibility, then presumably an employer (like the County) cannot commit a violation of the Act by offering to do more.

We note that Plaintiffs have purported to cite contrary legislative history in support of their theory of liability. pecifically, during the floor debates of September 24, 1990, Senator Bentsen inquired of Senator Pryor whether the Texas Teacher Retirement System would be consistent with the OWBPA. That system provided a different retiree health plan for retirees age 65 and over because those retirees were eligible for Medicare Part B. Senator Bentsen posed the following question to Senator Pryor:

> If the system pays approximately the equivalent amount to purchase the private insurance for the prospective retiree under 65 as for the prospective retiree 65 or older, does the system's retiree health package violate the ADEA as amended by [the OWBPA]?

136 CONG REC. 25,366 (1990). Senator Pryor gave a somewhat tentative response:

> I would say to my good friend from Texas that I wish I could give him a more definite answer than the one I am about to give. I know that he wants to provide a comfort level with this legislation for the Texas State Teacher's Retirement System.
>
> The purpose of equal benefit or equal cost is to allow employers to take account of the fact that the cost of some benefits rises with the age of the employee. If your scenario is correct and the system spends the same amount in acquiring health coverage for all prospective retirees regardless of age, I would say that the system has a good argument that it has satisfied the equal benefit or equal cost principle.

Id.

We are not convinced that this exchange supports the Plaintiffs' theory of recovery in this case. First, in light of the clear directive on "Retiree Health" set forth in the Statement of Managers, we question the persuasiveness of Senator Pryor's comments. Furthermore, when the above conversation is read in context, it appears that the most one can say about Senator Pryor's comments is that he apparently believed the ADEA afforded protection from discriminatory retirement health plans that were in effect *prior* to the time of the worker's retirement. We note that the colloquy cited by Plaintiffs was preceded by the following exchange:

> Mr. BENTSEN. Is it the understanding of the Senator that the Age Discrimination in Employment Act does not apply to retirees?
>
> Mr. PRYOR: The distinguished Senator is correct. The ADEA applies only to employees and those individuals seeking employment. However, it does apply to an individual whose retirement benefits are discriminatorily structured *prior to retirement.*

136 CONG. REC. 25,366 (1990) (emphasis added). Senator Bentsen then went on to pose his question to Senator Pryor concerning the Teacher Retirement System of Texas. Notably, however, the two Senators spoke in terms of health benefits that were being offered under the Texas Plan to *prospective* retirees.

In sum, then it seems that Senator Pryor interpreted the ADEA as generally inapplicable to retired persons; however, in his view, *prospective retirees* would be able to claim protection where an employer offered discriminatorily structured retirement health plans that were in effect at the time the prospective retirees were still employed. Similar views were expressed by Representative Clay during debates in the House of Representatives:

> Since the ADEA covers only employees and those individuals seeking employment, nothing in the bill would apply the provisions of the ADEA to retirees. Thus, for example, it would not be a violation of the ADEA, if an employer provided an ad hoc cost-of-living adjustment to all current retirees above a certain age. Of course, nothing in the bill would alter the current protection under the ADEA for an employee whose retirement or health benefits are discriminatorily structured based on age at the time of retirement.

136 CONG REC. 27,059 (1990). Even assuming this interpretation, however, it does not advance the Plaintiffs' claim. In this case, Plaintiffs are complaining about allegedly

discriminatory changes in their health plans which occurred *after* their retirement. Thus, even assuming there is an ambiguity in the record concerning the application of § 4(f)(2)(B)(i) to retirement health benefits, it is not an ambiguity which assists the Plaintiffs' cause.

3. *The Administrative Regulations*

The administrative history also suggests that, historically, the EEOC did not consider retirees to be protected by the "equal cost/equal benefit" rule in the context of health benefits. This point is borne out by an examination of the history of the applicable administrative regulation.

As noted above, when the ADEA was originally passed in 1967, the initial implementing regulation interpreted § 4(f)(2)'s "subterfuge" language as requiring compliance with the "equal cost/equal benefit" rule for age-based cost distinctions in certain employee benefits. *See* 34 Fed.Reg. 9709 (June 21, 1969), *codified in* 29 C.F.R. § 860.120(a) (1970). In 1978, Congress increased the "cut-off" age for protection under the ADEA from age 65 to age 70. *See* Age Discrimination in Employment Act Amendments of 1978, Pub.L. 95-256, § 3(a) (April 6, 1978), 92 Stat. 189. This meant that, for the first time, individuals over the age of 65 were now covered by the ADEA.

In response to this change, the Department of Labor issued an interpretive bulletin which specifically addressed the application of the "equal cost/equal benefit" rule in the context of health care benefits for older workers who were Medicare-eligible. *See* 44 Fed.Reg. 30648 (May 25, 1979). The Department's May 25, 1979 Interpretive Bulletin expressly authorized the use of Medicare "carve-out" plans [16] and supplemental

[16] "Carve-out" health plans refer to plans whereby, for employees ages 65 or older, the employer "carves out" from its own health insurance plan, or directly offsets, those benefits actually paid for by Medicare. Under this approach, Medicare assumes primary responsibility for health care expenses and the employer's regular plan pays only for those expenses it insures

plans [17] that would encourage employees over the age of 65 to choose Medicare as their primary insurer. *See* 29 C.F.R. § 860.120(f)(1)(ii)(A) (1980), published at 44 Fed.Reg. 30660 (May 25, 1979).

In 1982, Congress passed the Tax Equity and Fiscal Responsibility Act ("TEFRA") of 1982. Pub.L. 97-248, 96 Stat. 324 (1982). Section 116(a) of the TEFRA added a new subsection (g) to § 4 of the ADEA, which stated: "Any employer must provide that any employee aged 65 through 69 shall be entitled to coverage under any group health plan offered to such employee under the same conditions as any employee under age 65." *Id.* at Title I, § 116(a), 96 Stat. 353 (1982), *as codified in* 29 U.S.C. § 623(g) (1982). In essence, this amendment nullified the "equal cost/equal benefit" rule with respect to group health plans and instead created the more stringent requirement that employers offer health coverage under any group health plan on the same terms and conditions to *all of their employees, regardless of age*. The intent of this provision was to reduce federal expenditures by shifting from Medicare to employers some portion of the costs associated with providing health care to employees ages 65 and older. See 48 Fed.Reg. 26435 (June 7, 1983) ("[t]he overall intent of Section 4(g) [is] to relieve Medicare of the responsibility of providing primary health insurance coverage for the working elderly.").

The EEOC published interim regulations the following year which were designed to provide guidance for complying with

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against which are not actually paid for by Medicare. *See* 44 Fed.Reg. 30653-30654, 30660 (May 25, 1979).

[17] Medicare-supplement plans are separate health insurance plans for employees ages 65 or older which attempt to anticipate the benefits that will be paid under Medicare and then supplement the employee with benefits which Medicare is not anticipated to pay. *See* 44 Fed.Reg. 30654, 30660 (May 25, 1979).

the new § 4(g) of the ADEA.[18] *See* 48 Fed.Reg. 26434 (June 7, 1983). Significantly, the EEOC advised that *retirees would not be considered "employees" covered by 29 U.S.C. § 623(g).* The EEOC's interim rule of June 7, 1983 noted that the "TEFRA amendment to the ADEA significantly alters an employer's obligations regarding maintenance of group health insurance plans for *active* employees aged 65 through 69." *Id.* at 26434 (emphasis supplied). The EEOC further commented:

> The issue has also been presented concerning an employer's obligations to employees aged 65 through 69 who are at present not actively employed but who are receiving health care benefits by virtue of extended coverage under an employer's health plan. In such a situation, the Commission will look to all the facts and circumstances to determine whether an employment situation still exists. Employees engaged in seasonal work who retain seniority rights and other indicia of a continuing employment relationship will in all likelihood fall within the meaning and spirit of Section 4(g). On the other hand, employees gratuitously provided extended coverage after the termination of employment status were not intended to fall within the scope of section 4(g). Their status would be most like that of a retiree.
>
> *Retirees are not embraced by the term employee and are, therefore, not covered by the literal wording of the new section.*

Id. at 26435 (emphasis supplied).

Section 4(g) of the ADEA was later repealed in 1989 but, in the meantime before that repeal occurred, the EEOC deleted

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[18] Responsibility and authority for the enforcement of the ADEA was officially transferred from the Department of Labor to the Equal Employment Opportunity Commission effective July 1, 1979. *See* 48 Fed.Reg. 26434 (June 7, 1983).

subsection (f)(1)(ii) of 29 C.F.R. § 1625.10 [19]—the regulation which had previously authorized the use of employer-provided Medicare "carve-out" and "Medicare supplement" health benefit plans. The reason for this deletion was that the EEOC considered the authorization for Medicare carve-out plans and Medicare-supplemental plans to be contrary to, and in conflict with, the directive of § 4(g) of the ADEA. *See* 53 Fed.Reg. 5971-5972 (Feb. 29, 1988).

Although convoluted, this somewhat tortured legislative and administrative history demonstrates several significant points. First, § 4(f)(2) of the ADEA has always been interpreted by the EEOC as requiring compliance with the equal cost/equal benefit rule where age-based distinctions in employee benefits are concerned. Second, insofar as the specific benefit of health insurance is concerned, from 1982 to 1989, the protections afforded by § 4(f)(2) were superseded and supplanted by a more specific and exacting form of protection under § 4(g). Third, it is apparent that the EEOC considered retirees to be outside the scope of protection afforded by Section 4(g). Thus, we can logically infer that the EEOC likewise viewed retirees as outside the scope of protection afforded by § 4(f)(2), at least where the subject of health benefits is concerned.

4. *Policy Considerations*

Finally, the Court finds that there are valid policy reasons which support the conclusion that Plaintiffs are not entitled under the ADEA to the relief they now seek. For one, the legislative history suggests that Congress's primary purpose in passing the OWBPA was to prohibit the type of employee benefit discrimination, such as that at issue in the *Betts* case, which might discourage older workers from remaining in the workforce and/or punish older workers who remain actively

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[19] The regulations set forth in the Labor Department's May 25, 1979 Interpretive Bulletin were recodified at 29 C.F.R. § 1625.10(f)(1)(ii)(A)-(C) (1987). *See* 52 Fed.Reg. 23812 (June 25, 1987).

employed. In his description of the major features of S. 1511, Representative Clay explained the significance of preventing discrimination in employee benefits:

> It is little consolation to an older worker to be protected from discriminatory wage payments if an employer is free to discriminate based on age in the broad range of employee benefits that are included as part of an individual's compensation, benefits that often are valued between one-quarter and one-third of earned wages.
>
> * * * * * *
>
> Congressional reaffirmation of the original 'equal benefit and equal cost' principle, subject to the narrow exceptions the Congress has crafted, will ensure that productive older workers, an ever-growing segment of our labor force both in numbers and importance, are not discouraged from remaining actively employed. The elimination of mandatory retirement, the requirement of non-discriminatory pension accruals for employees working beyond normal retirement age, and recent changes in the social security system are designed to eliminate barriers, monetary and otherwise, to the continued employment of older persons.

136 CONG. REC. 27,059 (1990). The case of *Public Employees Retirement Sys. of Ohio v. Betts* is illustrative. In Betts, the "evil" presented by the Ohio PERS disability plan was that active workers like June Betts were penalized for remaining actively employed past age 60. That is, it was because Betts remained actively employed until age 61, rather than taking an earlier disability retirement, that she lost her eligibility for a disability retirement. Thus, the discriminatory system, which was in effect while Betts was still actively employed, essentially discouraged her and other older workers from remaining in the

work force because they would be penalized by virtue of the fact that they became disabled at an older age.[20]

By contrast, the policy about which Plaintiffs now complain did not penalize any of the Plaintiffs for remaining actively employed, nor did it effectively discourage them from remaining in the work force. To the contrary, under the policy at issue here, Plaintiffs would be better off by having remained in the work force, because it is undisputed that active employees remain eligible for health coverage under the traditional indemnity plan that Plaintiffs so strongly favor. Thus, the alleged discrimination at issue here does not undermine the ADEA's goal of encouraging the employment of older individuals.

Second, the statement of the Senate Managers and the comments of Senator Hatch suggest that these legislators considered retiree health benefits an important largess which should not be discouraged or jeopardized by a rigid application of the equal cost/equal benefit rule. Because the cost of such benefits can represent a prohibitively large expense, there is a very real danger that employers would attempt to comply with the equal cost/equal benefit rule by simply eliminating (or severely reducing) health benefits for all retirees. The statement of the Senate Managers regarding "Retiree Health" and the comments by Senator Hatch reflect a Congressional intent to encourage employers to provide retirement health benefits (even

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[20] The fact that Congress deliberately limited § 4(f)(2)(B)(i)' s application to benefits afforded to "older workers" and "younger workers" is further evidence that Congress's primary intent was to prohibit discriminatory benefit plans which, if not cost-justified under the equal cost/equal benefit rule, might impact arbitrarily and adversely on *active* employees. Likewise, the comments of Senator Pryor and Representative Clay (suggesting that the ADEA does not protect retirees but does protect employees who are subjected to a discriminatory benefit plan in effect at the time of retirement) also support the view that Congress intended the OWBPA to prevent discriminatory benefit plans which have a detrimental impact on active employees.

if limited in duration) by freeing them of the regulations imposed by § 4(f)(2)(B)(i). In short, it appears that Congress believed "something is better than nothing" in the area of retiree health benefits.

Finally, applying the Plaintiffs' interpretation of the ADEA to this case would result in a potentially problematic construction under § 4(l)(2) of the Act. *Inter alia*, that provision allows employers, in the case of "a contingent event unrelated to age" (i.e., layoffs or plant shutdowns), to offset an employee's severance pay by the amounts of any retiree health benefits and/or "pension sweeteners" to which the employee might be entitled. *See* 29 U.S.C.A. § 623(l)(2)(A) (West 1999). *See also* 136 CONG REC. 27,059-27,060 (1990) (discussing the operation of § 4(l)(2) in more detail). Notably, § 4(l)(2)(D) and (E) specifically contemplate that an employer will be able to avail itself of this setoff even if the employer does not provide retiree health benefits to retirees over the age of 65. 29 U.S.C.A. § 623(l)(2)(D) and (E). Stated differently, it appears that an employer is not required under the ADEA to offer retiree health benefits to both pre-Medicare and post-Medicare eligible retirees in order to take advantage of the offset.

Given this fact, Plaintiffs' interpretation of the ADEA seems problematic. Under Plaintiffs' theory, it is a violation of the ADEA to provide disparate health benefits to retirees based on Medicare eligibility or non-eligibility. Yet § 4(l)(2) would permit the employer to take advantage of the severance/retiree health benefit setoff, even if the employer is maintaining a retirement health plan which, under the Plaintiffs' theory, is violative of the Act. It is illogical to believe that Congress would have intended employers to be able to benefit in this manner from the offering of a retiree health benefit plan which is unlawful under the Act.

For all of the foregoing policy reasons, we conclude that the ADEA does not afford the protection which Plaintiffs are seeking.

5. *Plaintiffs' Cases*

In arguing that they are entitled to protection under the ADEA, Plaintiffs rely chiefly on *Milwaukee Prof. Fire Fighters v. City of Milwaukee*, 869 F.Supp. 633 (E.D.Wis.1994) and *McKeever v. Ironworker's District Council*, No. Civ. A. 96-5858, 1997 WL 109569 (E.D.Pa. March 7, 1997). Having carefully reviewed this authority, we find the first case distinguishable and the second one unpersuasive.

In *Milwaukee Prof. Fire Fighters*, unions representing firefighters and other city employees brought suit against various city agencies, alleging that certain aspects of the retirement/disability plan violated the ADEA. Unlike the benefit plans at issue in this case, the plans at issue in *Milwaukee* did not involve specifically the administration of retiree health benefits, and thus the district court did not have any occasion to consider the special policy considerations or the legislative history at issue here. Secondly, the benefit plans at issue in *Milwaukee* involved benefit schemes whose discriminatory provisions (i) were in place while the individuals were still active employees, and (ii) provided disincentives for the individuals to remain in the active work force, because they penalized the retirees for having worked to an older age. These plans were thus very much like the type of plans at issue in Betts, so it is clear that the *Milwaukee* plaintiffs were advancing the types of claims intended to be within the scope of the OWBPA's protection.

More to the point is *McKeever v. Ironworker's Dist. Council*, No. Civ. A. 96-5858, 1997 WL 109569 (March 7, 1997), which Plaintiffs also rely on and which, at least facially, does appear to support their case. The plaintiffs in *McKeever* were retired union members who were enrolled in a lifetime health benefit plan as a benefit of their employment. The plan was subsequently amended to exclude coverage for retirees and pensioners who had reached age 65. The plan administrators sought dismissal partly on the ground that the plaintiff retirees

were not "employees" within the meaning of the ADEA, and therefore lacked standing to bring suit under the Act.

The district court concluded both that the plaintiffs had standing to bring their claim and that they had stated a viable claim for relief under the ADEA. The *McKeever* court initially considered the language of § 623(a) and found the terms "employee" and "individual" to be ambiguous as to whether they include or exclude retirees. The court noted that the language of § 623(a)(1) creates a "legally protected interest in not being discriminated against in eligibility for employment-related benefits based on age," but it "does not define the duration of that coverage." 1997 WL 109569 at *2. Nevertheless, the *McKeever* court resolved the ambiguity in favor of the retirees. It noted that the ADEA is a remedial statute and that certain provisions of the ADEA—such as the proscription against discriminatory discharges, and the ability of courts to issue reinstatement under the ADEA—clearly contemplate that former employees will make use of the statute's remedial provisions. The court reasoned that "a finding that retirees are included within § 623(a)(1)'s coverage is more consistent with the broader context provided by other ADEA sections and with the ADEA's general remedial purposes." *Id.* at *3. The court was concerned that "[f]ailure to recognize these retired individuals' claim would potentially undermine the protective purposes of the statute." *Id.* at *3.

This Court is in agreement with the *McKeever* court's opinion that the terms "employee" and "individual" are facially ambiguous with respect to the scope of coverage afforded to retired persons. Further, we agree with the general proposition that certain aspects of the ADEA were clearly intended to afford protection to former employees including, in some circumstances, retirees. The case of June Betts is a case in point.[21]

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[21] *See also* 29 U.S.C. § 623(f)(2)(B)'s proscription against employee benefit plans which require or permit the involuntary retirement of an

Nevertheless, we respectfully depart from the conclusion of the *McKeever* court insofar as it holds that the term "employee" or "individual" extends to retirees seeking to challenge an alleged disparity in post-retirement health benefits based on Medicare eligibility. First, the *McKeever* decision makes no mention whatsoever of the legislative and administrative history which, at least in this Court's view, clearly demonstrates Congress's intent to prohibit these types of challenges under the ADEA. Second, the *McKeever* court did not acknowledge or attempt to reconcile the provisions of § 623(l)(2)(D), which appears to sanction (at least implicitly) retiree health plans that provide benefits only up to the age of Medicare-eligibility. For these reasons, this Court respectfully declines to adhere to the reasoning and holding of *McKeever*.

Summary

Although the Court is mindful of the ADEA's remedial nature and appreciative of the need to construe the Act liberally where ambiguity exists, we must also attempt to apply the Act in the manner in which Congress intended. The terms "individual" (as used in § 4(a)(1)), "employee" (as used in § 4(a)(2)), and "older worker" (as used in § 4(f)(2)(B)(i)) do not facially indicate whether the Plaintiff retirees are entitled to the type of protection they are seeking under the ADEA. Nevertheless, when we consider these terms in the specific context advanced by the Plaintiffs, and in light of the broader context of the statute as a whole (as set forth in the extensive legislative and administrative history), we conclude that there is no ambiguity in the intended application of the ADEA. For all of the reasons discussed above, we conclude that the ADEA clearly was not intended to apply to retirees, like the Plaintiffs here, who premise their complaint on alleged disparities in their retirement health benefits based on Medicare-eligibility.

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individual based on his or her age. Obviously, an individual who is forced to "retire," in violation of this provision, might well seek redress under the ADEA.

In rejecting the Plaintiffs' claim for relief under the Act, note that Plaintiffs are not left completely without a remedy at this point. They are alleging that the County breached a promise to continue providing health care, throughout their retirement, on the same terms and conditions under which it was provided while the Class members were active employees. Accordingly, Plaintiffs may still pursue their state law claims for breach of contract and promissory estoppel.

IV. CONCLUSION

Based upon the foregoing reasons, we conclude that the ADEA does not afford relief to the Plaintiffs under the theory they are advancing. We will therefore deny Plaintiffs' motion for partial summary judgment on Count I and grant the Defendant's cross-motion for partial summary judgment on that same count.

An appropriate order follows.

ORDER

AND NOW, this ___ day of September, 1999, for the reasons set forth in the accompanying Memorandum Opinion,

IT IS HEREBY ORDERED that Plaintiffs' Motion [Doc. No. 16] for Partial Summary Judgment is DENIED and the Defendant's Motion [Doc. No. 26] for Partial Summary Judgment is GRANTED.

JUDGMENT is hereby entered in favor of Defendant, the County of Erie, Pennsylvania on Count I in accordance with the terms of the accompanying Memorandum Opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3877

ERIE COUNTY RETIREES ASSOCIATION and LYMAN H. COHEN, for himself and all others similarly situated,
Plaintiffs-Appellants

v.

THE COUNTY OF ERIE, PENNSYLVANIA and Erie County,
Defendant-Appellee

SUR PETITION FOR REHEARING

Before: BECKER, *Chief Judge* SLOVITER MANSMANN, SCIRICA, NYGARRD, ALITO, ROTH, McKEE, BARRY, AMBRO and FUENTES, *Circuit Judges*, GREENBURG, *Senior Circuit Judge* and SHADUR, *Senior District Judge*.*

The petition for rehearing filed by the Appellee in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court in banc, the rehearing is hereby DENIED.

IT IS SO ORDERED.

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* Judges Greenburg and Shadur's vote is limited to panel rehearing only.

By the Court,

/s/ Hon. Theodore A. McKee
HON. THEODORE A. MCKEE
Circuit Judge

Dated: Sep. 6, 2000

APPENDIX D

Title 29 of the United States Code Provides:

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that--

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 622. Education and research program; recommendation to Congress

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and

contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures—

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * *

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

> **(A)** to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or
>
> **(B)** to observe the terms of a bona fide employee benefit plan—
>
> **(i)** where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger

worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or —

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

* * *

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section—

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because—

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for—

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age(specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age—

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of Title 26) that—

> **(i)** constitutes additional benefits of up to 52 weeks;
>
> **(ii)** has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and
>
> **(iii)** is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)—

> **(i)** the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);
>
> **(ii)** the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or
>
> **(iii)** the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event thatoccurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)—

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

* * *

§ 630. Definitions

For the purposes of this chapter--

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

* * *

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.

The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

* * *

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

(2)

Supreme Court, U.S.
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No. 00-906

In The

Supreme Court of the United States

COUNTY OF ERIE, PENNSYLVANIA,

Petitioner,

v.

ERIE COUNTY RETIREES ASSOCIATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE FACTS

Since 1972 the Erie County Employees' Retirement Board, and then Petitioner, the County of Erie, Pennsylvania (the "County"), maintained a policy of providing health care benefits to certain former County employees, including Respondents (the "Retirees"). Historically County retirees were provided traditional indemnity health insurance plans.[1] In recent years these plans were issued by Highmark Blue Cross/Blue Shield ("Highmark"), the regional Blue Cross/Blue Shield licensee. The County had two coverage "groups" of retirees, one consisting of "Medicare eligible" retirees, and one consisting of non-Medicare eligible retirees. Until recently these two plans were very similar. The only significant difference between the two older plans was that the plan provided to the Medicare-eligible retirees was "Medicare coordinated."[2]

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[1] Generally, under a traditional indemnity plan, an insured can "self-refer" and obtain covered treatment from almost any medical care provider, but there are policy "deductibles" and "co-pays" and usually the insured must complete various coverage claims forms.

[2] The plan described this coordination as follows:

> If you are entitled to Medicare benefits (either due to age or disability) your Blue Cross and Blue Shield Program will not duplicate payments or benefits provided under Medicare. However, your Blue Cross and Blue Shield Program will supplement the Medicare benefits, including the deductible and coinsurance not covered by Medicare, provided the services are eligible under your group's Blue Cross and Blue Shield Program.

In 1997 County officials decided that the County would mandate changes to health care benefits for its eligible retirees. The first group the County targeted was its oldest retirees because "it was a larger group" and the County could realize the greatest cost savings by forcing this group into a less expensive plan. The County decided to force its oldest retirees, all of whom were "Medicare eligible" because of their age, into the Highmark "SecurityBlue" plan.

The SecurityBlue plan is generally described as a "Medicare HMO" plan. It is a traditional HMO-plan which requires almost all care to be initially authorized by the insured's "gatekeeper" or "primary care physician" ("PCP"), and virtually all treatment provided outside the "network" of SecurityBlue providers located in Northwest Pennsylvania is not covered. It is also a "Medicare HMO", which in this situation means generally that the insured elects SecurityBlue coverage and thereby surrenders her right to receive benefits under Medicare, the Federal government makes a *per capita* payment to Highmark in lieu of providing Medicare benefits to the insured, and Highmark agrees to insure the provision of services as set forth under the terms of the SecurityBlue plan (which benefits may differ from traditional Medicare-provided benefits). At least initially, and apparently because of the size of the Retiree group and Highmark's receipt of payment from the Federal government, Highmark did not charge *any* premium to the County to provide SecurityBlue benefits to the Retirees.

The County determined that effective February 1, 1998, all eligible County Medicare-eligible retirees, who

reside within the SecurityBlue coverage area,[3] would be required to elect the SecurityBlue insurance plan or lose all coverage from the County. In July 1998, when Judith Lynch, the County Executive responsible for making the decision to switch coverages, explained to the press what the County had done, she said: "What the County did was to put all retirees sixty-five and older into the Security Blue. They have essentially the same benefits but without the cost to the County."

Effective February 1, 1998, as a result of this mandated change, approximately 235 County retirees age 65 and over and their spouses were forced to either accept the SecurityBlue coverage, or discontinue their coverage from the County and obtain their own health insurance coverage.[4] When the change was implemented, the County paid nothing to provide the SecurityBlue coverage to County retirees age 65 and over, while it continued to pay a significant premium for each County retiree under age 65 who had coverage under the old Highmark indemnity plan. The County retirees covered under SecurityBlue were required to continue to pay approximately $43 per month for Medicare Part B or they would lose their coverage under SecurityBlue. Younger retirees under the old Highmark indemnity plan made a $12 per

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[3] The SecurityBlue coverage area includes most counties in northwestern Pennsylvania.

[4] Discovery showed that after the change was implemented, there were seven County retirees who were Medicare eligible due to disability rather than age and who were covered by SecurityBlue. These retirees were not eligible to be members of the Plaintiff class because they were not Medicare eligible due to age.

month premium contribution to the County for their coverage.

Subsequently the County announced that effective October 1, 1998, it would change the coverage for County retirees who were not Medicare eligible from their traditional Highmark indemnity plan to the "SelectBlue" plan. SelectBlue is another Highmark product which is generally described as a "point of service" plan. It combines the features of an HMO plan and a traditional indemnity plan. An insured under this plan can, for any health care incident, select either the HMO option and accept its benefits (including possibly lower costs and no claims forms) and limitations (including the need for PCP-coordinated care and the network limitations), or the traditional indemnity option (which provides, *inter alia*, the ability to "self-refer" and to obtain covered treatment from practically any medical provider anywhere). That change was implemented as planned on October 1, 1998 and now all County retirees under age 65 who are not Medicare eligible due to disability and who live within the Highmark service area have been forced into the SelectBlue plan. County retirees in the SelectBlue plan pay no premium to the County or the Federal government for that coverage.

Thus, after October 1, 1998, when the County had completed moving its retirees into new plans, the situation was this: The County paid nothing to provide the SecurityBlue coverage to Medicare-eligible retirees, and those retirees were required to pay approximately $43 per month for Medicare Part B to remain eligible for SecurityBlue. The County paid about $285 per month to provide SelectBlue coverage to non-Medicare-eligible retirees, and

those retirees paid nothing for their coverage. Retirees covered under the SecurityBlue plan had a pure HMO plan; retirees covered under SelectBlue had a point of service plan which provided both HMO-type coverage and traditional indemnity-type coverage. There were also many other differences between the benefits provided under the two plans. For example, the older retirees under SecurityBlue were limited to a prescription drug "formulary" while younger retirees under SelectBlue were not.

The County has realized a significant savings by forcing the Retirees into SecurityBlue, both by initially eliminating the cost of providing health care benefits to the Retirees, and by spending the least on benefits for the Retirees as compared to the cost to provide benefits to all other active County employees and non-Medicare eligible County retirees. Before the switch to SecurityBlue, the County was paying about $300 per person per month for medical benefits for the Retirees under the old Highmark indemnity plan. After the switch, it paid nothing to provide benefits to the Retirees. After the non-Medicare eligible retirees were switched to SelectBlue, the County was paying about $285 per month per person to provide coverage to these retirees under SelectBlue, while it continued to pay nothing to provide coverage to the older Retirees under SecurityBlue. Although in subsequent plan years Highmark has charged a premium to the County for covered Retirees under the SecurityBlue plan, that premium has always been significantly less than the premium charged to the County for the health care insurance provided to County retirees covered under any other plan. The record evidence shows the County used

the savings realized by forcing the Medicare-eligible retirees into SecurityBlue to, *inter alia*, defer the rising cost of providing traditional indemnity health care coverage to *active County employees*.

After being forced into the SecurityBlue plan, the Retirees brought suit asserting, *inter alia*, claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA). The Retirees class consists of those County retirees who were receiving health insurance benefits from the County on or before February 1, 1998, and who are "Medicare eligible" solely because they are age 65 or over, and who reside within the Highmark service territory, and who were therefore forced to either accept SecurityBlue or discontinue their health care coverage provided by the County. The basis for the Retirees' claims under the ADEA has consistently been: (a) but for the fact that they are age 65 or over, the Retirees would not have been forced into SecurityBlue and therefore the County is treating the Retirees differently "because of their age" in violation of the ADEA; and (b) the County cannot meet the "equal cost or equal benefit" "safe harbor" provisions of the ADEA because (i) the County is spending less to provide the SecurityBlue benefits to the Retirees than it is spending to provide health care benefits to younger retirees, and therefore the County cannot meet the "equal cost" safe harbor, and (ii) the benefits provided under SecurityBlue are different, and in certain ways lesser, than the benefits provided to younger retirees, and therefore the County cannot meet the "equal benefit" safe harbor.

Because the underlying facts are not disputed, both the Retirees and the County crossed-moved for summary judgment in the district court. The Retirees moved for a

judgment of liability only, asserting that the undisputed facts show a violation of the ADEA because the County is treating them differently in the provision of their health care benefits solely because they are age 65 or over, and therefore Medicare-eligible, and that the County cannot meet either safe harbor test. On summary judgment in the district court, the County's primary argument was that it was discriminating against the Retirees on the basis of their "Medicare eligibility" and not their age, and that this was permissible under this Court's ruling in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

The district court properly rejected the County's arguments and concluded that because "for the Plaintiffs, eligibility for Medicare followed ineluctably upon attaining age 65", and because "Plaintiffs' age was a determinative factor in their placement in the SecurityBlue Plan" (App., 63a), the County was discriminating against the Retirees "because of their age" in violation of the ADEA. However, the district court, *sua sponte*, raised the issue of "whether Plaintiffs, as retired persons, were entitled to protection under the ADEA." (App., 66a). Rejecting prior case law, the district court concluded "the ADEA clearly was not intended to apply to retirees . . . who premise their complaint on alleged disparities in the retirement health benefits based on Medicare-eligibility." (App., 89a). Based upon this conclusion raised by the district court itself, it granted the County's motion for summary judgment.

The Retirees appealed to the Third Circuit Court of Appeals. A panel of the court reversed, holding that it "cannot accept the district court's approach" that the

ADEA does not apply to the provision of health care benefits to Medicare-eligible retirees "for the straightforward reason that it is not reflected in the actual language of the ADEA or the [Older Workers Benefit Protection Act]." (App., 39a). The panel did agree with the district court's conclusion that "the County 'implemented an age-based criterion' by placing Medicare eligible retirees in SecurityBlue." (App., 35a). The panel concluded "that the safe harbor set forth in 29 U.S.C. § 623(f)(2)(B)(i) is applicable if the County can meet the equal benefit or equal cost standard." (App., 43a). The panel "remanded to the district court for a determination as to whether the standard has been satisfied." (App., 43a).[5] The County's petition for rehearing and suggestion for rehearing *en banc* were denied by the court of appeals with no written dissent. This case is now before the district court awaiting resolution of the issues remanded.

ARGUMENT

There are no compelling reasons to grant a writ of certiorari in this case. The decision of the Third Circuit Court of Appeals in this case is not in conflict with any other decision by any other court of appeals. Rather, the decision below is entirely consistent with all the prior case law with the sole exception of the decision of the district court in this case.

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[5] The Petitioner's statement (Petition for Certiorari, p. 5, n. 3) that the court of appeals remanded solely to determine whether the County can meet the "equal benefit" safe harbor is incorrect.

The decision of the court of appeals in this case is not in conflict with any decision by any state court of last resort. Similarly, Petitioners do not and cannot allege that the court of appeals has departed from the accepted and usual course of judicial proceedings, or that it has sanctioned such a departure by the lower court.

Indeed, the only basis on which the County asks this court to grant review is its assertion that this case involves an "issue of statutory construction that has not been, but should be, settled by this Court." (Petition for Certiorari, p. 5).

The issues in this case were properly identified and resolved by the court of appeals and there is no need for this Court's involvement. The two members of the panel who reached the merits agreed unanimously on the resolution of the issues, and the full Third Circuit Court of Appeals did not find the issues worthy of rehearing *en banc*. Not only are there no conflicting decisions of any court of appeals, all the relevant decisional law from the courts of appeals is consistent with the decision of the court of appeals in this case. The Equal Employment Opportunity Commission, which is charged with interpreting the ADEA, and whose interpretation is entitled to deference by this Court, *Bush v. Gore*, 531 U.S. ___ (December 12, 2000) (Ginsburg, J., dissenting, at 2), has interpreted the ADEA in a manner which is entirely consistent with the decision of the court of appeals below. 29 C.F.R. § 1625.10(e); EEOC Compliance Manual No. 915.003 (October 3, 2000).

Furthermore, this case is not even concluded and there has not yet been a finding whether the County even

violated the ADEA. This case has been remanded to the district court to provide the County the opportunity to prove whether it can meet either the equal cost or equal benefit test. Despite all the grave consequences postulated by the County, it still has the opportunity to demonstrate that it did not violate the ADEA in this case.

The specific contentions raised by the County will be addressed below. However, the applicable statutory provisions and interpreting regulations control the resolution of these issues, and they are set out first.

The general prohibitionary provision of the ADEA has always provided that it is "unlawful for an employer . . . to fail or refuse to hire or to discharge any *individual* or otherwise discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* age. . . . " 29 U.S.C. § 623(a)(1) (emphasis added).

Prior to this Court's decision in *Ohio Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989), there was uncertainty over whether the ADEA applied to the discriminatory provision of employment or "fringe" benefits. In *Betts* this Court held that the ADEA did not apply to employment benefits. In 1990 Congress enacted the Older Workers Benefit Protection Act of 1990, Pub.L. No. 101-433, 104 Stat. 978 (October 16, 1990) (OWBPA), specifically intending to legislatively overrule *Betts*. The primary purpose of the OWBPA was to "make[ ] clear that discrimination on the basis of age in virtually all forms of employee benefits is unlawful." S.Rep. No. 101-263, at 5, *reprinted in* 1990 U.S.C.C.A.N. 1509, 1510. One of the amendments to the ADEA included in the OWBPA was to

specifically define the phrase "compensation, terms, conditions, or privileges of employment" to "cover[ ] virtually all employee benefits and employee benefit plans." *Id.* The ADEA now provides that "[t]he term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." 29 U.S.C. § 630(l). Thus, the ADEA currently provides that it is unlawful for an employer to discriminate against *any individual* with respect to *any and all employee benefits* because of such individual's age. Although the OWBPA adopted several clearly defined exceptions in 29 U.S.C. §§ 623(i), (j) and (l), none of those exceptions applies to the provision of health care benefits to retirees.

In the OWBPA Congress also expressly incorporated the EEOC's "equal cost/equal benefit" "safe harbor" regulations into the ADEA. This "safe harbor" permits an employer to discriminate in the provision of employee benefits if the test is satisfied. The statutory provision provides:

> It shall not be unlawful for an employer, employment agency, or labor organization –
>
> . . . .
>
> (2) To take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section –
>
> . . . .
>
> (B) To observe the terms of a bona fide employee benefit plan –

> (i) *Where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989);*
>
> . . . .
>
> Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (a), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter. . . .

29 U.S.C. § 623(f) (emphasis added).

The regulations referred to in 29 U.S.C. § 623(f) explain that under the equal cost/equal benefit standard,

> benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even

> though the older worker may thereby receive a lesser amount of benefits or insurance coverage.

29 C.F.R. § 1625.10(a)(1).

Finally, at the time the OWBPA was enacted, through today, the regulations at 29 C.F.R. § 1625.10, which are expressly incorporated into the statutory "safe harbor" at 29 U.S.C. § 623(f), have specifically dealt with Medicare benefits. The relevant regulation provides:

> An employer does not violate the [ADEA] by permitting certain benefits to be provided by the Government, even though the availability of such benefits may be based on age. For example, it is not necessary for an employer to provide health benefits which are otherwise provided to certain employees by Medicare. However, the availability of benefits from the government will not justify a reduction in employer-provided benefits if the result is that, taking the employer-provided and government-provided benefits together, an older employee is entitled to a lesser benefit of any type (including coverage for family and/or dependents) than a similarly situated younger employee. For example, the availability of certain benefits to an older employee under Medicare will not justify denying an older employee a benefit which is provided to younger employees and is not provided to the older employee by Medicare.

29 C.F.R. § 1625.10(e).

The court of appeals has properly applied these statutory and regulatory provisions in this case to reach the conclusions that the Retirees are covered by the ADEA, that the County is discriminating against the Retirees on

the basis of their age, and that such discrimination violates the ADEA unless the County can prove on remand that it satisfies the equal cost or equal benefit safe harbor.

1. The County's primary argument in support of its petition is that the court of appeals erred in holding that the protection of the ADEA extends to retirees such as the Respondents in this case. Although the County argues that "the court of appeal's ruling is contrary to the statutory language of the ADEA" (Petition for Certiorari, p. 5), the County does not and cannot identify any specific provision of the ADEA to support its position because none exists.

The analysis of this issue is not difficult. The ADEA currently provides that it is unlawful for an employer to discriminate against *any individual* with respect to *any and all employee benefits* because of such individual's age. In our case, the claims of the Retirees arise out of the provision of health care benefits to them as part of the retirement benefits provided to them by the County. The Retirees are receiving health care coverage under the SecurityBlue plan because they are former employees of the County. The SecurityBlue coverage which the Retirees receive is plainly an "employee benefit", and therefore these benefits are encompassed within the statutory phrase "compensation, terms, conditions, or privileges of employment." There is no question that the County is an "employer" within the meaning of the ADEA, 29 U.S.C. § 630(b). Since the Retirees are indisputably "individuals", and since the ADEA unambiguously prohibits discrimination by "employers" "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age",

and since the provision of health care benefits to the Retirees is unambiguously an "employee benefit", the ADEA applies to the provision of SecurityBlue benefits to the Retirees.

The court of appeals agreed with this analysis. It held that "the ordinary meaning of the term 'employee benefit' should be understood to encompass health coverage and other benefits which a retired person receives from his or her former employer." (App., 28a-29a). Similarly, it held that "members of the plaintiff class are 'individuals' who have been treated differently by their 'employer' 'with respect to their compensation, terms, conditions, or privileges of employment.' " (App., 32a) (brackets omitted).

In *Robinson v. Shell Oil Company*, 519 U.S. 337 (1997), this Court held that the word "employee", as used in Title VII, includes "former employees." Title VII makes it unlawful "for an employer to discriminate against any of his *employees*. . . . " 42 U.S.C. § 2000e-3(a) (emphasis added). This Court found that use of the word "employee" in this context could mean "current employee" or it could include "former employees." *Robinson*, 519 U.S. at 345. This Court concluded that the remedial nature of the statute compelled the conclusion that the ambiguity should be resolved in favor of extending its reach to former employees. *Robinson*, 519 U.S. at 345-46. Since the ADEA and Title VII have nearly identical provisions defining "employee", and both statutes "have a similar purpose – to stamp out discrimination in various forms – cases construing the definitional provisions of one are persuasive authority when interpreting the other[ ]." *Hyland v. New Haven Radiology Associates*,

PC, 794 F.2d 793, 796 (2d Cir. 1986). Recognizing this, the court of appeals properly concluded that *Robinson* "supports [its] interpretation" that the Retirees are entitled to the protection of the ADEA in this case.

> *Robinson* indicates that an employer's adverse actions taken against someone who has ceased actively working for that employer may constitute discrimination against an "employee." By analogy, an employer who treats retirees differently with respect to health care coverage because of their age may have engaged in discrimination with respect to "employee benefits."

(App., 30a).

The decision of the court of appeals in this case is consistent with the decisions of all other courts which have addressed this issue (with the sole exception of the district court in this case). *McKeever v. Ironworker's District Council*, 65 U.S.L.W. 2608, 70 Fair Empl. Prac. Cas. (BNA) 44548, 73 Fair Empl.Prac.Cas. (BNA) 1000, 1997 WL 109569, 109569 *3 (E.D.Pa. 1997) ("a finding that retirees are included within § 623(a)(1)'s coverage is more consistent with the broader context provided by other ADEA sections and with the ADEA's general remedial purposes"); *Schism v. United States*, 972 F.Supp. 1398, 1406 (N.D.Fla. 1997) ("[t]he term 'employee' under the ADEA may include retired employees challenging an allegedly discriminatory pension plan"); *Milwaukee Professional Fire Fighters Association, Local 215, IAFF, AFL-CIO v. City of Milwaukee*, 869 F.Supp. 633, 649 (E.D.Wis. 1994) ("the term 'employee' is to be interpreted broadly; retired employees are still considered 'employees' under the ADEA 'as long as the alleged discrimination is related to or arises out of

the employment relationship.' *EEOC v. Cosmair*, 821 F.2d 1085, 1088 (5th Cir. 1987). *See also Passer v. American Chemical Society*, 935 F.2d 322, 330 (D.C.Cir. 1991); *Caudill v. Farmland Industries*, 698 F.Supp. 1476, 1485 (W.D.Mo. 1988)").

Given the explicit language of the ADEA, and the clarification in the OWBPA that all employment benefits are covered by the ADEA, and the consistent prior case law directly on point, and the clarity of this Court's decision in *Robinson* interpreting a similar provision in Title VII, it is hardly surprising the County did not even assert on summary judgment that the Retirees may not be entitled to protection under the ADEA.

2. Because there is nothing in the text of the statute to support the County's position, it argues that "the legislative history of the OWBPA indicates that retirees were not intended to be covered." (Petition for Certiorari, p. 11) (emphasis omitted). The ADEA's prohibition against the discrimination against individuals in the terms, conditions and privileges of employment existed prior to passage of the OWBPA. There is nothing in the legislative history of the ADEA as originally enacted which supports the County's argument. Nonetheless, the County argues that the legislative history of the OWBPA, which was enacted to make it clear that the ADEA *did* apply to "any and all employee benefits", shows that Congress "intended" to exclude retirees from coverage. The obvious shortfall in this argument is that there is nothing in the text of the ADEA, before or after passage of the OWBPA, which supports this interpretation. Although certain members of Congress made statements

in the record which tend to support the position of the County, nothing in the text of statute supports it.

As the court of appeals observed, during consideration of the OWBPA several proposed amendments were introduced to specifically state that discrimination in the provision of health care benefits to retirees on the basis of Medicare eligibility would not violate the ADEA, and those amendments were never enacted. (App., 27a, n. 7). Moreover, in the OWBPA Congress did enact several new and very specific "safe harbor" exceptions to the prohibitions of the ADEA at 29 U.S.C. § 623(l)(1)(B) and § 623(l)(2)(A). (App., 96a-100a). One of these detailed exceptions specifically mentions "retiree health benefits", but only in the context of a safe harbor relating solely to severance benefits. 29 U.S.C. § 623(l)(2)(D). The legislative history does show Congress understood the issue, and the OWBPA as enacted does show that Congress knew how to articulate a specific exception if it wanted to. Nonetheless, when it finally passed the OWBPA Congress failed to articulate *any* exception permitting discrimination in the provision of health care benefits to retirees on the basis of their eligibility for Medicare benefits.

The court of appeals observed that despite a complete absence of any statutory support,

> it appears the district court simply recognized an additional safe harbor for an employer who treats its Medicare-eligible retirees less favorably with respect to health benefits than other retirees – a safe harbor which does not require the employer to satisfy the equal benefit or equal cost standard.

(App., 11a). Recognizing that "the language of the statute must guide us in the first instance" (App., 28a), the court of appeals concluded that "there is nothing in the language of the ADEA to indicate that these statements [in the legislative record relied upon by the County] are accurate and we do not find them to be persuasive." (App., 30a).

Despite statements in the legislative debates about retiree health care benefits, there is nothing in the text of the ADEA, as amended by the OWBPA, which supports the County's argument either that no retiree benefit is covered by the ADEA, or that there is some unwritten exception permitting discrimination in the provision of medical benefits to Medicare-eligible retirees.[6]

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[6] The County continues to be unable to clearly articulate how it believes the ADEA should be interpreted, probably because the clearer it articulates its position the less defensible its position becomes. It remains unclear whether the position of the County is that absolutely *no* post-employment benefit is covered by the ADEA (in which case it makes no sense for Congress to even discuss pension or severance benefits since these are post-employment benefits), or that only benefits which are "discriminatorily structured" before retirement are covered (despite the complete absence of this distinction in the text of the statute and the absurd consequences which would flow from that interpretation as recognized by the court below), or that only retiree medical benefits generally or retiree medical benefits provided to Medicare eligible retirees in particular are not covered (again despite the complete absence of this distinction in the text of the statute).

The language of the statute must control, and the County's attempt to create an exception based on statements in the legislative debate, which were never incorporated into the text of the statute, was properly rejected by the court below.

3. The County also tries to create an ambiguity by asserting that the decision of the court below "creates a conflict" with a safe-harbor provision relating to severance benefits in 29 U.S.C. § 623(l)(2). (Petition for Certiorari, p. 19). The County attempts to create this "conflict" by ignoring the specific language of 29 U.S.C. § 623(l)(2)(D).

Section 623(l)(2) is one of the very specific safe harbors created in the OWBPA. Section 623(l)(2)(A) explains the circumstances under which an employer can deduct either "retiree health benefits" or pension benefits from severance pay without violating the ADEA. Section 623(l)(2)(D) then defines "retiree health benefits." It states: "For purposes of this paragraph [*i.e.*, paragraph (2) of § 623(l)] *and solely in order to make the deduction authorized under this paragraph,* the term 'retiree health benefits' means . . . . " 29 U.S.C. § 623(l)(2)(D) (emphasis added).

The County simply ignores this unambiguous language and argues that a finding that the ADEA bars discrimination against Medicare-eligible retirees in the provision of medical benefits absent satisfaction of the equal cost/equal benefit test creates an inconsistency with 29 U.S.C. § 623(l)(2)(D). Congress's express statement in § 623(l)(2)(D) that the definition of "retiree health benefits" in that paragraph is to be used "solely in order

to make the deduction authorized under this paragraph" means what it says – that an employer may meet the severance pay safe harbor if it complies with § 623(l)(2)(D), but providing retiree health care benefits consistent with the definition in the severance benefits safe harbor is relevant *solely* for that safe harbor. The court of appeals appropriately recognized that because § 623(l)(2)(D) expressly states that the definition of "retiree health benefits" in that paragraph is to be used "solely in order to make the deduction authorized under this paragraph", "Congress did not intend this provision to affect the interpretation of other portions of the ADEA." (App., 40a, n. 13). The County is arguing that it could provide "retiree health benefits" which satisfy the severance pay safe harbor provisions of § 623(l)(2)(D) and it could still violate the ADEA under the lower court's holding. This is exactly what the statute says, and there is, therefore, no "conflict."

4. Switching to another issue, and relying on this Court's decision in *Hazen Paper*, the County argues that even if the Retirees are protected by the ADEA as the court of appeals found, it did not discriminate against them "because of age." No court has agreed with the County on this point, not even the district court below.

In *Hazen Paper*, this Court dealt with the situation in which the employer discriminated on the basis of years of service, not age. This Court recognized that although there may be a "correlation" between age and years of service, "age and years of service are analytically distinct . . . . " *Hazen Paper*, 507 U.S. at 611. In this case, all the Retirees in the class became Medicare eligible solely as a result of their age, and they were, therefore, forced into

the SecurityBlue plan because of their age. As the court of appeals recognized, *Hazen Paper* is

> distinguishable. Medicare eligibility does not merely "correlate with age", as does years of service. Rather, as the district court here pointed out, Medicare eligibility "follows ineluctably upon attaining age 65." Thus, Medicare status is a direct proxy for age.

(App., 33a) (brackets and internal citations omitted).

The holding by the court of appeals below is consistent with the decisions of other courts of appeals. In *Johnson v. State of New York*, 49 F.3d 75 (2d Cir. 1995), the Air National Guard (ANG) had a policy that members of the ANG must retire at age 60. The plaintiff was employed by New York State (the "State"). The State had a "dual status" requirement, which required plaintiff to maintain his position with the ANG to maintain his employment with the State. Plaintiff turned 60 and, because of the ANG's policy, he was forced to retire from the ANG. When plaintiff retired from the ANG, the State terminated his employment. According to the State, plaintiff's employment with the State was terminated not because plaintiff turned 60, but because plaintiff lost his dual status when he was forced to retire from the ANG.

In rejecting the State's argument and finding a violation of the ADEA, the Second Circuit Court of Appeals held that "[t]he flaw in the State's argument is that the decision to require dual status, with consequent mandatory retirement at 60 . . . is not merely *correlated* with age; unlike *Hazen Paper*, the employer's decision here in fact *implements* an age-based criterion." *Johnson*, 49 F.3d at 79-80 (emphasis in original).

The Seventh Circuit Court of Appeals reached the same conclusion in *Huff v. UARCO, Inc.*, 122 F.3d 374 (7th Cir. 1997). In *Huff* the employer maintained a pension plan under which

> a plan participant who has completed ten years of service and attained the age of fifty-five is eligible for early retirement. The plan also provides that a person terminating employment before becoming eligible for early retirement may elect a lump sum refund of all of that person's contributions under the plan, with interest. But a person terminating employment after becoming eligible for early retirement is entitled only to a payout of benefits over time, actuarially adjusted to take into account the extra years of receiving the benefit.

Huff, 122 F.3d at 387. The court found that the plan discriminated against persons 55 and older because persons 55 and older with ten years of service must take a payout of pension benefits over time, while persons under age 55 with ten years of service could take a payout over time *or* elect a lump sum payout. The court rejected the employer's claim that under *Hazen Paper* the employer was permissibly acting on a basis other than age. The court found that

> [b]ecause age is an express condition of receiving a benefit, we think that the instant case presents a close approximation of the case *Hazen Paper* declined to decide. Nothing in *Hazen Paper* prohibits a finding that [the employer's] expressly age-related policy violates the ADEA. Under the policy, no worker under 55 would ever be denied a lump sum payout, regardless of that worker's years of service. But for the

> age-related restriction, certain workers over fifty-five would be eligible for the lump sum payout. This is not a case where there is merely a correlation between age and the denial of a particular benefit. [The employer's] policy draws an express line between workers over fifty-five and those under.

Huff, 122 F.3d at 388 (citations omitted). Whether the employer characterized the disparate treatment as based directly on age or on eligibility for early retirement is immaterial, since eligibility for early retirement is itself based directly on age. *See also Equal Employment Opportunity Commission v. Local 350, Plumbers and Pipefitters*, 998 F.2d 641, 646 (9th Cir. 1992) (when the union's plan purports to discriminate only on the basis of retirement, but only employees 55 and older are eligible to retire, the employer is acting on the basis of age in violation of the ADEA); *Equal Employment Opportunity Commission v. Borden's, Inc.*, 724 F.2d 1390, 1393 (9th Cir. 1984) (when an employer discriminates on the basis of retirement status, and retirement status is based on age, the employer discriminates on the basis of age for purposes of the ADEA).

In the present case, there is more than a "correlation" between age and the treatment the Retirees received. The Retirees' eligibility for Medicare, and therefore SecurityBlue, is *defined* by age. There is no need for statistical analysis. If a non-disabled retiree lives within the Highmark service territory and is age 65 or over, they *always* get the SecurityBlue plan; if a non-disabled retiree lives within the Highmark service territory and is under age 65, they *always* get the SelectBlue plan. The Retirees in the class are eligible for Medicare/SecurityBlue because of

their age. If they were age 64, they would not be eligible and they could have coverage under the SelectBlue plan.

Furthermore, the applicable regulations include 29 C.F.R. § 1625.10(e). This specific regulation expressly provides guidance on how an employer can permissibly discriminate on the basis of age and still meet the equal cost/equal benefit safe harbor by permitting certain benefits, including Medicare benefits, to be provided by the government. 29 C.F.R. § 1625.10(e) provides that "[a]n employer does not violate the [ADEA] by permitting certain benefits to be provided by the Government, *even though the availability of such benefits may be based on age. For example,* it is not necessary for an employer to provide health benefits which are otherwise provided to certain employees by *Medicare.*" (Emphasis added). This regulation was expressly incorporated into the ADEA in the passage of the OWBPA. 29 U.S.C. § 623(f)(2)(B). Congress's express incorporation of this regulation into the ADEA, and the plain recognition in the regulation that Medicare benefits may be "based on age", demonstrates even Congress understood, when it passed the OWBPA, that discrimination on the basis of age-based Medicare eligibility is discrimination "because of age" within the meaning of the ADEA.

Since the Retirees are being treated differently because they are 65 years of age or older, and therefore Medicare eligible, and not for some "analytically distinct" reason which is merely "correlated with" age, both the district court and the court of appeals properly held that the County is discriminating against the Retirees "because of age" within the meaning of the ADEA. There is no issue here which requires "settlement" by this court.

5. The County's final argument is basically a public policy argument. The County argues this court should review this matter because, according to the County, and based upon statistics which are outside the record in this case, many employers are discriminating in their provision of health care benefits to retirees on the basis of Medicare eligibility and they may, therefore, be violating the ADEA under the holding of the court of appeals below.[7] Whether the ADEA should be re-written to permit employers to discriminate against retirees when they reach Medicare age is a question of policy. The proper forum to debate this issue is in Congress, not the courts. Congress debated this issue when it passed the OWBPA, but never adopted the exception the County would like. If the County believes this was bad policy, its recourse is to return to Congress, not to have this Court make these policy decisions with no statutory support.

Furthermore, as explained above, the applicable regulation in 29 C.F.R. § 1625.10(e) makes it obvious that discrimination on the basis of Medicare eligibility can violate the ADEA unless the employer meets the provisions of that regulation explaining how Medicare benefits are to be coordinated with employer-provided benefits. This regulation was in effect before passage of the OWBPA, and was incorporated into the ADEA when the OWBPA was adopted. All the Federal decisional law

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[7] The County fails to undertake any analysis of whether the employers who are purportedly discriminating against retirees in the provision of health care benefits on the basis of Medicare eligibility are nonetheless meeting the equal cost/equal benefit safe harbor.

decided after passage of the OWBPA overruled *Betts*, and before the decision by the district court in this case, has held uniformly that the ADEA *does* apply to the provision of employment benefits to retirees. It is unclear why the employers referred to by the County purportedly failed to comply with the ADEA in the face of all the contrary authority, but their alleged failure to understand or follow the law does not provide a compelling reason for this Court to grant review in this case.

In addition, the County's assertion about the possible consequences of the decision below is pure speculation. The County argues that if employers who are failing to comply with the ADEA must now do so, "employers may choose to comply with the ruling below by eliminating entirely retiree health care benefits." (Petition for Certiorari, at 28). Although this is always a possibility, it makes little sense. An employer could take the same amount it is currently spending on retiree health care benefits and if they are violating the ADEA, restructure their plans so the employer spends no more in total dollars, but provides benefits to all its retirees in a manner which does not violate the ADEA. Why employers who may be violating the ADEA would eliminate retiree health care coverage, when they can continue to spend no more in premium dollars and just restructure their plans so the plans do not violate the ADEA, is far from self-evident.

The wholly speculative nature of the County's argument is further exemplified by its assertion that "[g]iven the steady rise in the cost of retiree health care, a significant number of employers may choose to comply with the ruling below by eliminating entirely retiree health care

benefits." (Petition for Certiorari at 28). Of course, "given the steady rise in the cost of retiree health care," a significant number of employers may choose to eliminate entirely retiree health care benefits regardless of the decision in this case. On the other hand, many employers are contractually obligated to continue to provide health care benefits and the employer cannot just eliminate the benefits even if the cost goes up or they must comply with the ADEA.

Just because an employer is spending less on health care benefits for older retirees or providing different benefits to older retirees does not necessarily mean it is violating the ADEA. Even in this case, there has not been a finding that the County is violating the ADEA, since it still has an opportunity to show it meets the equal cost/equal benefit safe harbor provisions. The ADEA *does* permit employers to discriminate in the provision of medical benefits to retirees on the basis of Medicare eligibility, provided they comply with the statutory safe harbor provisions. In this case, if the County had spent the same amount on benefits for the Retirees, or if it provided the same benefits to the Retirees *even if it spends less*, it may still satisfy the safe harbor.

Interestingly, the County does not talk about the facts of *this* case when complaining of the consequences of the decision below. Here the County eliminated the cost of providing medical benefits to the Retirees, reduced the cost of providing medical benefits to the younger retirees, and used some of that savings to pay the increased costs for traditional indemnity insurance for its *active employees*. The County does not even attempt to explain why requiring it to provide medical benefits to its eligible

retirees in a way that does not violate the ADEA is undesirable. The facts of this case show that employers may react to the changing medical care environment in many different ways. There is, however, no merit in the County's argument that employers should be able to react in a way that violates the ADEA.

The issues involved in this case have been thoroughly and correctly decided by the court of appeals below. Its decision is consistent with prior case law, with prior regulations and with the EEOC's recent policy statement on the subject. There are no compelling reasons to grant the County's petition for a writ of certiorari.

CONCLUSION

The County's petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 00-906

In the

Supreme Court of the United States

COUNTY OF ERIE, PENNSYLVANIA,

Petitioner,

v.

ERIE COUNTY RETIREES ASSOCIATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

Central States, Southeast and Southwest Areas Health and Welfare Fund ("CS Fund"), pursuant to Rule 37 (b) of the Rules of this Court, respectfully moves for leave to file an *amicus curiae* brief.

1. Petitioner County of Erie, Pennsylvania has provided written consent to the filing by CS Fund of an *amicus curiae* brief. Respondents have declined to provide written consent to the filing by CS Fund of an *amicus curiae* brief.

2. CS Fund is a multiemployer plan and an employee welfare benefit plan (and trust) funded by thousands of contributing employers (each an "employer" as defined in 29 U.S.C. § 630[b]).

3. For 30+ years CS Fund's benefits plan has included a separate plan for coverage of its eligible retired participants and their eligible spouses ("CS Retiree Plan"), a plan now placed at serious risk by the decision in *Erie County Retirees Association* v. *County of Erie, Pennsylvania*, 220 F.3d 193 (3rd Cir. 2000), of a charge that it has long violated, and is violating, the proscription by the Age Discrimination in Employment Act of 1967 ("ADEA") of ". . . discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ." 29 U.S.C. § 623(a).

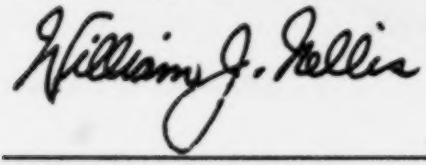
4. Around 25,000 eligible retirees and their eligible spouses are covered by the CS Retiree Plan and receive benefit payments from CS Fund in excess of $150 million

per year. From its inception on May 1, 1970, until the present, the CS Retiree Plan has at all times prescribed, and prescribes, Medicare entitlement as a coverage termination event, consistent with the fact that its coverage has always served, and serves, as a bridge to Medicare from early retirement. Until the *Erie County Retirees* decision on August 1, 2000, there was every reason for CS Fund and employee welfare benefit plans across the nation to conclude that their bridge-to-Medicare retiree benefit programs were entirely lawful. In *Erie County Retirees*, however, the Third Circuit has announced that unlawful age discrimination infects those programs.

5. In its proposed *amicus curiae* brief, CS Fund seeks to focus on the serious threat to bridge-to-Medicare retiree benefit programs of multiemployer plans (and other plans) which the *Erie County Retirees* decision by the Third Circuit creates, in the context of a reason additional to those stated in the pending petition. That reason is the separate and express authority enacted by Congress for the termination of specific benefits coverage, by CS Fund and other employee welfare benefit plans, at the time and on the basis of Medicare entitlement. That termination authority was created by the Consolidated Omnibus Budget Reconciliation Act of 1985, *see* 29 U.S.C. § 1162(2)(D) and 26 U.S.C. § 4980B(f)(2)(B)(iv), and Congress, when it later enacted the Older Workers Benefit Protection Act of 1990 (amending the ADEA in the wake of, and in response to, a 1989 decision by this Court), did not to any extent curtail that authority to terminate coverage upon Medicare entitlement.

December 29, 2000.

Respectfully submitted,



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BRIEF OF *AMICUS CURIAE*

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THE INTEREST OF THE *AMICUS CURIAE*[1]

Central States, Southeast and Southwest Areas Health and Welfare Fund ("CS Fund") is a multiemployer plan and an employee welfare benefit plan (and trust) funded by thousands of contributing employers (each an "employer" as defined in 29 U.S.C. § 630[b]). For 30+ years CS Fund's benefits plan has included a separate plan for coverage of its eligible retired participants and their eligible spouses ("CS Retiree Plan"), a plan now placed at serious risk by the decision in *Erie County Retirees Association* v. *County of Erie, Pennsylvania*, 220 F.3d 193 (3rd Cir. 2000), of a charge that it has long been in substantial and continuous noncompliance with the proscription by the Age Discrimination in Employment Act of 1967 ("ADEA") of ". . . discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ." 29 U.S.C. § 623(a). As hereinafter explained in further detail, around 25,000 eligible retirees and their eligible spouses are covered by the CS Retiree Plan and receive benefit payments from CS Fund in excess of $150 million per year. From its inception on May 1, 1970, until the present, the CS Retiree Plan has at all times prescribed, and prescribes, Medicare entitlement as a coverage termination event, consistent with the fact that its coverage has always served, and serves,

---

[1] This brief has been authored entirely by counsel of record for the CS Fund. No counsel for a party to this proceeding authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation and submission of this brief.

as a bridge to Medicare from early retirement. Until the *Erie County Retirees* decision on August 1, 2000, there was every reason for CS Fund and employee welfare benefit plans across the nation to conclude that their bridge-to-Medicare retiree benefit programs were entirely lawful. In *Erie County Retirees*, however, the Third Circuit has announced that unlawful age discrimination infects those programs. CS Fund and other plans need to ascertain and confirm the legality of their bridge-to-Medicare retiree benefit programs.

SUMMARY OF THE ARGUMENT

CS Fund seeks to focus on the serious threat to bridge-to-Medicare retiree benefit programs of multiemployer plans (and other plans) which the *Erie County Retirees* decision by the Third Circuit creates, in the context of a reason additional to those stated in the pending petition. That reason is the separate and express authority enacted by Congress for the termination of specific benefits coverage, by CS Fund and other employee welfare benefit plans, at the time and on the basis of Medicare entitlement. That termination authority was created by the Consolidated Omnibus Budget Reconciliation Act of 1985, *see* 29 U.S.C. § 1162(2)(D) and 26 U.S.C. § 4980B(f)(2)(B)(iv), and Congress, when it later enacted the Older Workers Benefit Protection Act of 1990 (amending the ADEA in the wake of, and in response to, a 1989 decision by this Court), did not to any extent curtail that authority to terminate coverage upon Medicare entitlement.

ARGUMENT: REASONS FOR ALLOWANCE OF THE WRIT

Petitioner County of Erie, Pennsylvania ("Petitioner") is both an "employer" for purposes of the ADEA, 29 U.S.C. §§ 621-634, and the plan sponsor of a single-employer plan. CS Fund (*amicus curiae*), which is familiar to the Court from past appearances as a party and as an *amicus curiae* (it is *an amicus* in *Reynolds Metal Co.* v. *Robert Ellis*, pending No. 99-1787, in which certiorari was granted on November 27, 2000), is neither the "employer" (save for its own employees, a minimal fraction of its participant base) nor a single-employer plan. CS Fund and its jointly administered sister plan are described by the Court in *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 561-562 (1985):

> "Petitioners are two large multiemployer benefit plans, the Central States, Southeast and Southwest Areas Pension Fund and the Central States, Southeast and Southwest Areas Health and Welfare Fund (hereinafter referred to collectively as Central States). [FN1] Governed by § 302(c)(5) of the Labor Management Relations Act, 1947, 29 U.S.C. § 186(c)(5), and the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, 29 U.S.C. § 1001 et seq., as amended by the Multiemployer Pension Plan Amendments Act of 1980, Pub.L. 96-364, 94 Stat. 1208, these plans operate as trusts for the purpose of providing specified health, welfare, and pension benefits to employees performing work that is covered by collective-bargaining agreements negotiated by various affiliates of the International Brother-

hood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters)."

* * * * *

"FN1. As the Court of Appeals noted: 'The record . . . indicates that the Funds are among the largest Taft-Hartley trust funds in the United States, that more than 13,000 employers participate and that they serve more than 500,000 employees whose job classifications are covered in thousands of collective bargaining agreements.' 698 F.2d 802, 811 (CA 6 1983). See also Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364, 373, n. 16, 104 S.Ct. 1844, 1850, n. 16, 80 L.Ed.2d 366 (1984)."

CS Fund offers a perspective and an impact statement on the issue presented that Petitioner cannot. Being a negotiated multiemployer plan and employee welfare benefit plan (and trust), CS Fund brings to the Court thousands of its contributing employers (each an "employer" as defined in 29 U.S.C. § 630[b]) and their employees, all of whom have consented to the total and continuing delegation to CS Fund and its trustees of exclusive authority and responsibility to establish, define, amend, maintain and administer its plan benefits.

For 30+ years CS Fund's benefits plan has included a separate plan for coverage of its eligible retired participants and their eligible spouses ("CS Retiree Plan"), a plan now placed at serious risk by the Third Circuit's recent decision in *Erie County Retirees*, 220 F.3d 193, *supra*, of a charge that it has long been in substantial and continuous noncompliance with

ADEA mandates.[2]

The creation and material terms of the CS Retiree Plan were announced by CS Fund in a letter to its participants dated October 16, 1970 (20 years after CS Fund was established), stating in relevant part as follows (emphasis in original):

> "As a result of the recently negotiated National Master Freight Agreement which provided for increases of a total of $4.00 per week over a 39 month period in Health and Welfare contributions to the Fund, the Trustees are happy to announce the establishment of new RETIREES' HEALTH AND WELFARE PROGRAMS.
>
> "This new benefit schedule will be effective as of May 1, 1970 and will cover employees who retired on or after January 1, 1970, who were eligible for their retirement benefits under a qualified pension fund, and who were covered under the Central States, Southeast and Southwest Areas Health & Welfare Fund."

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[2] ADEA Section 4(a), 29 U.S.C. § 623(a), states in relevant part that "[i]t shall be unlawful for an employer—(1) to . . . otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ." Even though the administration and administrator (the board of trustees) of CS Fund are independent from its thousands of contributing employers, it is required by *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 463 U.S. 1073 (1983), that each such ". . . employer that adopts a fringe-benefit scheme that discriminates among its employees on the basis of . . . [age violates that ADEA mandate] regardless of whether third parties are also involved in the discrimination" (at 1089).

* * * * *

"To be eligible the member must have attained his 57th birthday. Program will cover retiree and his spouse from age 57 until age 65 when member becomes eligible for Medicare. Spouses' coverage terminates when members' coverage terminates.

"In the event that member dies prior to age 65, spouse will be covered for balance of five years measured from his retirement date, or until she becomes eligible for Medicare whichever is first.

"Where spouse is older than member, her coverage will terminate when she becomes 65 and member will continue until he is 65."

From its inception on May 1, 1970, until the present, the CS Retiree Plan has at all times prescribed, and prescribes, Medicare entitlement as a coverage termination event, consistent with the fact that its coverage has always served, and serves, as a bridge to Medicare from early retirement.[3] There was no toll charged by CS Fund for that bridge from its 1970 inception until October 1, 1988, and since that date the charge has been and is a $50.00 premium per retiree-spouse unit per month, an

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[3] When the CS Retiree Plan was established in 1970, the age-based initial Medicare entitlement date was the date on which the eligible ". . . individual . . . attained the age of 65" (absent other entitlement such as *early Medicare*). 42 U.S.C. § 1395i-2(a)(1). The age-based initial Medicare entitlement date remains the same today.

amount far less than corresponding coverage costs.[4]

During the past 30+ years, many tens of thousands of retirees and their spouses have come to depend upon the CS Retiree Plan as a bridge from active-employee coverage by CS Fund to Medicare entitlement. A demographic snapshot of CS Fund's eligible retiree-population age groups at year-end of the last five calendar (plan) years discloses the following eligible retiree-spouse units:

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[4] CS Fund records demonstrate the substantial extent to which its unsegregated trust assets subsidize benefit payments ("Retiree Benefits") for retirees and spouses covered by the CS Retiree Plan, such as this excerpt for the last five calendar (plan) years:

Year	Retiree Benefits	Premiums to CS Fund from Retirees and Spouses
1995	$111,660,000	$12,250,000
1996	121,785,000	13,389,000
1997	125,383,000	13,788,000
1998	133,327,000	14,060,000
1999	158,329,000	15,549,000
Total	$650,484,000	$69,036,000

Over this 1995-1999 period, the premium charges to eligible retirees and spouses ($69.036 million) have been less than 11% of the Retiree Benefits ($650.484 million) distributed to the same group. (A "retiree-spouse unit", to which each monthly premium is charged, is either a retiree alone [if there is no eligible spouse] or his/her eligible spouse [if the retiree is no longer eligible] or both retiree and spouse as a single unit.)

Retiree Age Group	12/31/95	12/31/96	12/31/97	12/31/98	12/31/99
48-50	35	66	57	64	81
51-54	943	905	746	905	1,112
55-59	5,203	5,316	5,114	5,919	6,664
60-62	6,558	6,620	6,304	6,612	6,878
63-64	5,652	5,507	5,405	5,571	5,636
65-67	2,938	4,034	4,412	4,401	4,456
Total	21,329	22,448	22,038	23,472	24,827

(The age used is the retiree's—group members over age 65 are eligible spouses of no-longer-eligible retirees, the spouses themselves being less than age 65.) As reflected in the above chart, CS Fund was distributing plan benefits to a group of 24,827 retiree-spouse units as of December 31, 1999. The CS Retiree Plan expressly provides, as it has for many years, that "Coverage under this Plan shall terminate on the earliest of the following dates", one of which dates is "on the date the Covered Participant [retiree or retiree's spouse] attains sixty-five (65) years of age . . ." (§§ 3.06 and 3.07).

That reliance by retirees, spouses and CS Fund itself has been placed not only on the express bridge-to-Medicare provisions of the CS Retiree Plan but on Congress itself. The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") amended ERISA and the Internal Revenue Code to provide, among other things, that employee welfare benefit plans including CS Fund must, in specified circumstances, offer continued coverage ("COBRA Continuation Coverage") to plan participants and their covered dependents for specific periods after

coverage would otherwise have terminated under plan terms. 29 U.S.C. §§ 1161-1167; 26 U.S.C. § 4980B. *See Geissal* v. *Moore Medical Corp.*, 524 U.S. 74 (1998). Congress expressly provided a list of COBRA Continuation Coverage termination events:

> **"(D) Group health plan coverage or medicare entitlement**
>
> "The date on which the qualified beneficiary first becomes, after the date of the election—
>
> "(i) covered under any other group health plan (as an employee or otherwise) . . ., or
>
> (ii) in the case of a qualified beneficiary other than a qualified beneficiary described in section 1167(3)(C) of this title, entitled to benefits under title XVIII of the Social Security Act [42 U.S.C.A. § 1395 et seq.]."

29 U.S.C. § 1162(2)(D); *accord* 26 U.S.C. § 4980B(f)(2)(B)(iv). Initial Medicare entitlement "after the date of the election" of COBRA Continuation Coverage is, by act of Congress, a permissible reason to terminate such coverage, and the CS Retiree Plan so provides (§ 3.08). In litigation about this same COBRA Continuation Coverage termination authority from Congress, as applied to termination of such coverage by Medicare entitlement, the Department of Health and Human Services ("HHS") claimed that Congress had subordinated that authority to another coverage mandate, 42 U.S.C. § 1395y(b)(1)(C), but the Fifth Circuit concluded otherwise in *Blue Cross and Blue Shield of Texas, Inc.* v. *Shalala*, 995 F.2d 70 (5th Cir. 1993). HHS subsequently changed its position and now acknowledges the supremacy of the above-cited

legislative authority for termination of COBRA Continuation Coverage, based upon Medicare entitlement, over the Medicare-related coverage mandate at issue in *Shalala*. *See* 42 CFR § 411.161(a)(3).

Employee welfare benefit plans including CS Fund are expressly authorized by Congress, in COBRA, to terminate COBRA Continuation Coverage upon Medicare entitlement: while that express authority relates to a specific federal coverage mandate, Congress has in ERISA scrupulously avoided placing coverage mandates upon employee welfare benefit plans in virtually all instances (COBRA being a rare exception). Such plans, including CS Fund, are granted discretion to create, amend and apply plan terms—including the extent to which prescribed coverage is subordinate to, and in some instances terminated by, other coverage including Medicare entitlement.

Until the *Erie County Retirees* decision on August 1, 2000, there was every reason for CS Fund and employee welfare benefit plans across the nation to conclude that their bridge-to-Medicare retiree benefit programs were entirely lawful. In *Erie County Retirees*, however, the Third Circuit has announced that unlawful age discrimination infects those programs. That infection is not traced to ADEA's 1967 enactment because, as the Third Circuit notes (220 F.3d at 203-204), this Court found otherwise in *Public Employees Retirement System of Ohio* v. *Betts*, 492 U.S. 158 (1989), stating in part that ". . . under this construction of the statute, Congress left the employee benefit battle for another day, and legislated [in the ADEA] only as to hiring and firing, wages and

salaries, and other non-fringe-benefit terms and conditions of employment" (at 177). Instead the Third Circuit bases the infection of unlawful age discrimination in the Older Workers Benefit Protection Act of 1990 ("OWBPA"), which was enacted in the wake of, and in response to, this Court's decision in *Betts*. The Third Circuit's opinion carefully traces OWBPA's legislative history (220 F.3d at 205-208) including this revealing pre-enactment record of legislative intent (136 Cong. Rec. S13,597 [daily ed. Sept. 24, 1990]; emphasis added):

> "Many employer-sponsored retiree medical plans provide medical coverage for retirees only until the retiree becomes eligible for Medicare. In many of these cases, where coverage is provided to retirees only until they attain Medicare eligibility, the value of the employer-provided retiree medical benefits exceeds the value of the retiree's Medicare benefits. Other employers provide medical coverage to retirees at a relatively high level until the retirees become eligible for Medicare and at a lower level thereafter. In many of these cases, the value of the medical benefits that the retiree receives before becoming eligible for Medicare exceeds the total value of the retirees' Medicare benefits and the medical benefits that the employer provides after the retiree attains Medicare eligibility. These practices are not prohibited by this substitute. Similarly, nothing in this substitute should be construed as authorizing a claim on behalf of a retiree on the basis that the actuarial value of employer-provided health benefits available to that retiree not yet eligible for Medicare is less than the actuarial value of the same benefits available to a younger retiree."

In the face of OWBPA's abundant legislative history that recorded a clear legislative intent to continue and preserve ADEA's now-undisputed 1967-1990 allowance of bridge-to-Medicare retiree benefit programs, the Third Circuit proceeded to an analysis that ultimately resulted in its conclusion that such programs do fall within ADEA Section 4(a)'s ambit (29 U.S.C. § 623[a]) of proscribed age discrimination in "compensation, terms, conditions, or privileges of employment. . . ." 220 F.3d at 208-213. The errors in that analysis and conclusion are explained in Petitioner's pending application for a writ of certiorari—CS Fund adopts that explanation and, in order to preserve the true legislative intent of Congress on the important issue presented, requests that this Court reverse the Third Circuit's decision in *Erie County Retirees*.

CONCLUSION

If permitted to stand, the decision by the Third Circuit in *Erie County Retirees*, which is a misreading of the ADEA, will create major disruption of bridge-to-Medicare retiree programs throughout the United States. A legislative remedy may not be forthcoming (and, in any event, may not be retroactively effective). Retroactive and prospective benefit disbursements to hundreds of thousands, probably millions, of individuals may be needed, for multi-year coverage periods (essentially, from age 65 Medicare entitlement until death), unless this decision is corrected. The Third Circuit has decided an important question of federal law that has not been, but should be,

settled by this Court. The petition for a writ of certiorari should be granted.

December 29, 2000.

Respectfully submitted,

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MOTION FILED
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No. 00-906

IN THE
Supreme Court of the United States

COUNTY OF ERIE, PENNSYLVANIA,
Petitioner,

v.

ERIE COUNTY RETIREES ASSOCIATION, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Motion for Leave to File Brief *Amicus Curiae* and Brief of *Amici Curiae* American Association of Health Plans, Inc., American Benefits Council, Blue Cross Blue Shield Association Chamber of Commerce of the United States of America, and Health Insurance Association of America in Support of Petitioner

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

This case concerns the circumstances under which an employer may be held liable under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), for offering Medicare-eligible retirees health benefits that differ from those it offers to retirees who are not eligible for Medicare. Pursuant to Rule 37.2(b) of the rules of this Court, the American Association of Health Plans, Inc., the American Benefits Council, Blue Cross Blue Shield Association, the Chamber of Commerce of the United States of America, and the Health Insurance Association of America (collectively "*amici*") respectfully move this Court for leave to file the brief *amicus curiae* in support of Petitioner that has been lodged with this motion.

Amici have contacted the parties to this dispute to obtain permission to file this brief. Petitioner County of Erie, Pennsylvania, consented to the filing. Respondent Erie County Retirees Association declined to grant such consent.

As a group, *amici* represent a broad array of interests affected by the decision below. The American Association of Health Plans, Inc ("AAHP") is the national association for the managed health care community. Its membership includes health maintenance organizations (HMOs), preferred provider organizations (PPOs), third party health benefit administrators, health care utilization review organizations, prepaid limited health service plans, and other integrated health care delivery systems. AAHP represents more than 1000 managed health care organizations serving nearly 140 million Americans. AAHP's mission is to advance health care quality and affordability through leadership in the health care community, advocacy, and the provision of services to member health plans.

The American Benefits Council ("ABC"), formerly known as the Association of Private Pension and Welfare Plans, is a broad-based, non-profit trade association founded to protect and foster the growth of this Nation's privately-sponsored employee benefit plans. The members of ABC include both small and large employer sponsors of employee benefit plans, as well as plan support organizations, such as consulting and actuarial firms, investment firms, banks, insurers and other professional benefit organizations. Collectively, its more than 250 members sponsor and administer plans covering more than 100 million plan participants.

The Blue Cross Blue Shield Association comprises 47 independent, locally operated Blue Cross and Blue Shield Plans. Through relationships with employers, employee benefits plans, and direct contracts with subscribers, the Blue Cross and Blue Shield companies provide health insurance to private and public employees and individuals, including fee-for-service programs, health maintenance organizations, preferred provider organizations, and a variety of other offerings. They also provide third-party administrative services to private and public employee benefits plans. Collectively, the Blue Cross Blue Shield companies furnish health care coverage to 78 million – or one in four – Americans, making them (as a group) the largest U.S. entity offering health insurance and benefits.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation and serves as the principal voice of the business community. The Chamber represents an underlying membership of nearly three million businesses and organizations, with 140,000 direct members, in every size, sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus* briefs in this Court on issues of national concern to American business.

The Health Insurance Association of America ("HIAA"), based in Washington, D.C., is one of the largest associations of health insurance companies in the world. HIAA is an advocate for the private, market-based health insurance system. Its more than 290 members provide medical expense and supplemental insurance, as well as long-term care insurance and disability income protection to more than 123 million Americans. HIAA develops and advocates federal and state policies which build upon our health care system's quality, affordability, accessibility and responsiveness.

Because they believe the perspective of *amici* and their members would assist the Court in assessing the potential impact of the ruling below on private-sector employee benefit plans and related businesses, *amici* ask that this Court grant their motion for leave to file a brief *amicus curiae*.

Respectfully submitted,

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January 3, 2001

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BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF HEALTH PLANS, INC., AMERICAN BENEFITS COUNCIL, BLUE CROSS BLUE SHIELD ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI*[1]

The American Association of Health Plans, Inc. ("AAHP") is the national association for the managed health care community. Its membership includes health maintenance organizations (HMOs), preferred provider organizations (PPOs), third party health benefit administrators, health care utilization review organizations, prepaid limited health service plans, and other integrated health care delivery systems. AAHP represents more than 1000 managed health care organizations serving nearly 140 million Americans. AAHP's mission is to advance health care quality and affordability through leadership in the health care community, advocacy, and the provision of services to member health plans.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in whole or in part, and no person or entity other than *amici curiae* and their members made a monetary contribution to the preparation or submission of this brief.

include both small and large employer sponsors of employee benefit plans, as well as plan support organizations, such as consulting and actuarial firms, investment firms, banks, insurers and other professional benefit organizations. Collectively, its more than 250 members sponsor and administer plans covering more than 100 million plan participants.

The Blue Cross Blue Shield Association comprises 47 independent, locally operated Blue Cross and Blue Shield Plans. Through relationships with employers, employee benefits plans, and direct contracts with subscribers, the Blue Cross and Blue Shield companies provide health insurance to private and public employees and individuals, including fee-for-service programs, health maintenance organizations, preferred provider organizations, and a variety of other offerings. They also provide third-party administrative services to private and public employee benefits plans. Collectively, the Blue Cross Blue Shield companies furnish health care coverage to 78 million – or one in four – Americans, making them (as a group) the largest U.S. entity offering health insurance and benefits.

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supplemental insurance, as well as long-term care insurance and disability income protection to more than 123 million Americans. HIAA develops and advocates federal and state policies which build upon our health care system's quality, affordability, accessibility and responsiveness.

This case concerns the circumstances under which an employer may be held liable pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, for offering Medicare-eligible retirees health benefits that differ from those it offers to retirees who are not eligible for Medicare. As such, this case is of great importance to *amici* as representatives of businesses and private benefit plan sponsors subject to the ADEA, as well as of health care insurers and managed care organizations. *Amici* file this brief to urge the Court to grant *certiorari* in this case.

REASONS FOR GRANTING THE PETITION

The decision below will subject otherwise bona fide employer-sponsored retiree health plans in both the private and public sector to ADEA challenge based on their relative treatment of those retirees who are Medicare eligible and those who are not. This result is directly contrary to the definitive legislative history of the Older Workers Benefit Protection Act ("OWBPA"). Amici are very concerned that this decision will discourage the establishment and maintenance of these voluntary and socially important programs. The flaws in the decision of the court of appeals are discussed in depth in the Petition and will not be separately treated here. Rather, the purpose of this brief is to emphasize the serious policy implications of the Third Circuit's ruling, not only for public sector employers such as the Petitioner, but for the entire community of private employee benefit plans, their participants, and their service providers.

Private employers, like public entities, are subject to the strictures of the ADEA. But, unlike those of governmental

employers, private employee benefit plans are also subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), the "comprehensive and reticulated statute" that broadly regulates benefit plan administration. *See* ERISA § 4(a), (b)(1), 29 U.S.C. § 1003(a), (b)(1); *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980). And the strong congressional policy of ERISA, echoed by OWBPA's managers, is to avoid discouraging the creation and maintenance of benefit plans by subjecting them to overly burdensome regulation. Because it fails to respect the balance struck by Congress between protecting the interests of employees in receiving promised benefits free from unlawful discrimination and those of employers in structuring their benefit arrangements as they see fit, the decision below undermines the important federal policies of ERISA which Congress intended to preserve in enacting the OWBPA.

I. FEDERAL POLICY MANDATES CAUTION IN THE REGULATION OF EMPLOYEE BENEFIT PLANS

As explained in the Petition, the provisions of the ADEA at issue in this case were enacted in 1990 as part of OWBPA. *See* Pet. at 10. During consideration of that legislation, its managers recognized that over-regulation of benefit plans was counter to long-standing federal policy. Senator Orrin Hatch, a principal sponsor of the compromise that became OWBPA, explained that

> It has been our policy to encourage employers to provide generous employee benefits. Clearly, this objective is frustrated, if not defeated, if Congress enacts legislation that so heavily encumbers American companies that they must reduce or eliminate such benefits.
>
> . . . .

> We must be concerned about the impact on all employees of additional Federal requirements that unnecessarily complicate existing arrangements or that will shift a firm's resources from actual benefits into regulatory compliance or litigation.
>
> If an employer is forced to reduce or eliminate benefits for some workers to avoid litigation exposure or to avoid going afoul of the law, we have to ask the question: Is it worth it?

136 Cong. Rec. 25357 (1990). The resulting legislation, Senator Hatch further explained, was intended to "protect older workers' rights to fair and equitable benefits without disrupting the variety of employer-sponsored policies that benefit all workers." *Id.*

The concern that intrusive regulation ultimately could harm American workers by discouraging employers from offering generous benefits is a realistic one in light of ERISA's general approach to benefit plan regulation. As this Court has recognized, "[n]othing in ERISA requires employers to establish employee benefit plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). Rather, particularly with respect to welfare plans such as those providing retiree health benefits, "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate" their plans. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).[2] *See also, e.g., Hughes Air-*

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[2] ERISA defines "welfare plan" as "any plan, fund, or program . . . established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their

(Continued . . .)

craft Co. v. Jacobson, 525 U.S. 432, 441 (1999) (noting that private parties and not the government determine the level of plan benefits); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 551, 569 (1979) (same).

Nor was ERISA's non-regulation of benefit levels an oversight on Congress's part; it was instead a deliberate choice. Thus, ERISA's legislative history is replete with expressions of concern for the dangers of over-regulation. Congress particularly made an effort to avoid encouraging "employers to respond" to its regulatory efforts "by decreasing benefits under existing plans or slowing the rate of formation of new plans." H.R. Rep. No. 807, 93d Cong., 2d Sess. 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4682.[3] ERISA's statutory scheme reflects Congress's recognition of "the public interest in encouraging the formation of employee benefit plans." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).

This Court, through its recognition of the so-called "settlor doctrine," has been diligent in protecting the discretion that ERISA purposely reserved to plan sponsors. Plan par-

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beneficiaries . . . medical, surgical, or hospital care or benefits . . . ." ERISA § 3(1), 29 U.S.C. § 1002(1). Unlike pension plans, welfare plans are not subject to ERISA's minimum standards for participation, vesting, or funding. *See Curtiss-Wright*, 514 U.S. at 78.

[3] *See also id.* at 69 ("Employees, as a whole, might be injured rather than aided if . . . cost increases resulted in slowing down the growth or perhaps even eliminat[ing] private retirement plans."); 120 Cong. Rec. 29928 (1974) (comments of Sen. Williams) (increasing costs to the point that employers terminate their plans "[c]ertainly . . . is not the intent of this legislation which is designed to improve and encourage the expansion of private pension plans").

ticipants have often argued that employer action in altering the terms of its plan to the participants' detriment, even where not expressly prohibited by ERISA, constituted a breach of the employer's fiduciary duty to act solely in the interest of plan participants. *See generally* ERISA § 404(a), 29 U.S.C. § 1104(a). Without exception, such efforts have been rejected by this Court on the ground that "[w]hen employers undertake those actions [of adopting, modifying, or terminating their plans], they do not act as fiduciaries . . . but rather are analogous to the settlors of a trust." *Lockheed Corp.*, 517 U.S. at 890; *accord Pegram v. Herdrich*, 120 S. Ct. 2143, 2153 (2000); *Hughes Aircraft*, 525 U.S. at 443-44; *Curtiss-Wright*, 514 U.S. at 78.

The court below erred in failing to heed the concerns voiced by OWBPA's managers and in ignoring the role of ERISA and its policies. While ERISA was not implicated in the precise case before it, the court's ruling applies equally to private benefit plans that are subject to ERISA. In the current climate of increasing health care costs and decreasing employer-provided retiree medical benefits, as described in the following section, the decision below can only further encourage the reduction or elimination of such retiree health benefits.

II. THE NUMBER OF EMPLOYER-SPONSORED RETIREE MEDICAL PLANS IS DECLINING WHILE THE COST OF SUCH PLANS IS ON THE RISE

The Petition presents data showing that the practice of providing different levels of benefits to retirees based on Medicare eligibility is wide-spread in both the public and private sector. *See* Pet. at 26-28. Some of those same sources also confirm that "[t]he prevalence of coverage [for retirees] has declined" during the 1990s, "with some employers dropping coverage and few newer companies adding it."

The Henry J. Kaiser Family Foundation, RETIREE HEALTH COVERAGE: RECENT TRENDS AND EMPLOYER PERSPECTIVES ON FUTURE BENEFITS at 3 (Oct. 1999) ("Kaiser Study").

Even when coverage has not been eliminated altogether, employers have amended their programs making them less generous. For example, among 498 large employers the Kaiser Study reported an increase from 1991 to 1998 of 19 percentage points in the number of employers who required retirees over age 65 to contribute to the cost of their coverage. *Id.* at 5. During that same period, employers who placed caps on their own financial obligation increased by 40 percentage points. *Id.* at 6. And, also during the 1990s, the practice of requiring higher age and service for eligibility increased by 19 percentage points. *Id.* The outlook for the future is even more disturbing, with fully 81 percent of 600 respondents reporting that they would seriously consider increasing premiums and cost-sharing for retirees over 65 in the next three to five years. *Id.* at 9. These changes in retiree coverage have been felt by the courts in the form of the recent proliferation of litigation involving employer changes to retiree medical benefits.[4]

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[4] *See, e.g., Curtiss-Wright*, 514 U.S. 73; *Maurer v. Joy Technologies, Inc.*, 212 F.3d 907 (6th Cir. 2000); *Algren v. Pirelli Armstrong Tire Corp.*, 197 F.3d 915 (8th Cir. 1999); *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. BVR Liquidating, Inc.*, 190 F.3d 768 (10th Cir. 1999); *Pabst Brewing Co. v. Corrao*, 161 F.3d 434 (7th Cir. 1998); *International Ass'n of Machinists & Aerospace Workers v. Masonite Corp.*, 122 F.3d 228 (5th Cir. 1997); *American Fed. of Grain Millers v. International Multifoods Corp.*, 116 F.3d 976 (2d Cir. 1997); *Pisciotta v. Teledyne Indus.*, 91 F.3d 1326 (9th Cir. 1996); *Stewart v. KHD Deutz of Am. Corp.*, 75 F.3d 1522 (11th Cir. 1996); *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, 57 F.3d 1255 (3d Cir. 1995); *United Paperworkers Int'l*

(Continued ...)

That employers are considering such steps is not surprising in light of the recent rise in the cost of health care. According to a 2000 report by Towers Perrin, a prominent benefits consulting firm, "[f]or large employers, the year 2000 is bringing a double-digit rise in employee and retiree health care costs – the largest since the early 1990s." Towers Perrin, HEATH CARE COST SURVEY at 2 (Jan. 2000) ("TP Survey"). Specifically as to retirees, the survey found that employer costs of coverage for Medicare eligible retirees increased by 24 percent for 2000. *Id.* at 3. In general, "this year's survey shows a rapidly escalating increase in retiree medical costs across the board." *Id.* at 8. Like the Kaiser Study, the TP Survey found that more than half of the employers (57 percent) had responded to these cost pressures by changing their plans' designs and cost-sharing features and that 48 percent were considering adopting such changes.

These circumstances could well produce severe consequences for retirees and their families. Faced with ever-increasing costs, more employers are likely to terminate their retiree medical coverage altogether. Even for those plans that remain in place, the practice of imposing greater and greater costs on the retirees themselves could force retirees to opt out of the coverage. Subjecting employers to ADEA challenge for engaging in the common practice of taking Medicare eligibility in account in structuring their retiree health programs can only add to these pressures to reduce or eliminate coverage.

In light of these clear trends, this Court should continue its vigilance in preserving balances struck by Congress in

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Union v. Champion Int'l Corp., 908 F.2d 1252 (5th Cir. 1990); *Keffer v. H.K. Porter Co.*, 872 F.2d 60 (4th Cir. 1989).

both ERISA and the OWBPA by reversing the decision below.

CONCLUSION

For the reasons stated above and in the Petition, the Court should grant the Petition and issue a writ of certiorari to review the decision of the court of appeals.

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IN THE
Supreme Court of the United States

COUNTY OF ERIE, PENNSYLVANIA,
Petitioner,

v.

ERIE COUNTY RETIREES ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals For The Third Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

1. Respondents do not and cannot dispute that the effects of the decision in the court below reach well beyond the County of Erie, Pennsylvania ("the County"). This case poses issues of national importance affecting virtually every employer that elects to provide health coverage to its retirees, as well as every retiree who enjoys such benefits.

The attention given to and the concern engendered by the court belows decision is not limited to employers and retirees residing within the Third Circuit. As demonstrated by the *amici*, there is great concern that the decision below will cause uncertainty in the administration of health care plans, generate new uncertainty in the application of the ADEA in other employee benefit-related contexts, and may well lead to the unintended consequence of employers reducing or eliminating health care coverage for retirees in general. The seven *amici*—the American Benefits Council, the ERISA Industry Committee, the American Association of Health Plans, Inc., the Blue Cross Blue Shield Association, the Chamber of Commerce of the United States of America, the Health Insurance Association of America, and the Central States, Southeast and Southwest Areas Health and Welfare Fund—represent a broad array of interests. Taken together, these *amici* represent the interests of large employers maintaining ERISA-covered pension plans; more than 1,000 managed health care organizations serving nearly 140 million Americans; over 140,000 businesses and organizations of every size and in every economic sector and geographic region of the country; 47 independent, locally operated Blue Cross and Blue Shield Plans; and more than 290 private, market-based health insurance providers. The concerns

expressed by these *amici* provide strong reasons for granting *certiorari*.

Moreover, the court below's decision also is being used by the Equal Employment Opportunity Commission ("EEOC") as support for a nationwide enforcement effort based on the principle that "there is no provision in the ADEA permitting an employer to treat retirees differently with respect to health benefits based on Medicare eligibility" other than the equal cost or equal benefit defense. EEOC Compliance Manual No. 915.003 at ch. 3, § IV.B (Oct. 3, 2000). Indeed, Respondents even cite to the EEOC's Compliance Manual—which first announced the proposition quoted above *after* the court below's decision—as support for the proposition that the EEOC "has interpreted the ADEA in a manner which is entirely consistent with the decision of the court of appeals below." (Opp. at 9.) Respondents, however, fail to resolve the inconsistency between the EEOC's present view and its previous pronouncement that "[r]etirees are not embraced by the term employee" in connection with a now-repealed provision of the Tax Equity and Fiscal Responsibility Act ("TEFRA") of 1982, Pub. L. 97-248, 96 Stat. 324 (1982). (*See* Pet. at 12-13.)

2. Respondents'statement that the court belows decision is "entirely consistent with all the prior case law with the sole exception of the decision of the district court in this case" overstates the extent to which the Question Presented in the Petition has been addressed by the federal courts. In fact, almost all of Respondents' cases are easily distinguishable from the case at bar. For example, the benefit plans involved in *Milwaukee Professional Fire Fighters v. City of Milwaukee*, 869 F. Supp. 633 (E.D. Wis.1994), did not involve specifically the administration of retiree health benefits, and thus the district court in that case did not have any occasion to consider the special policy considerations or the legislative history at issue here. Moreover, the benefit

plans at issue in *Milwaukee* involved benefit schemes whose allegedly discriminatory provisions (i) were in place while the individuals were still active employees, and (ii) provided disincentives for the individuals to remain in the active work force, because they penalized the retirees for having worked to an older age. The district court in the instant case found that the plans in *Milwaukee* were thus very much like the type of plans at issue in *Ohio Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989), and reasoned that it was clear that the *Milwaukee* plaintiffs were advancing the types of claims intended to be within the scope of the OWBPA's protection, unlike Respondents' claims.

Although the facts in *McKeever v. Ironworker's District Council*, No. Civ. A. 96-5858, 1997 WL 109569 (E.D. Pa. Mar. 7, 1997), bear some similarity to the facts of this case, as the district court in this case found, there are ample reasons why that decision should not be followed. Specifically, that decision makes no mention whatsoever of the legislative and administrative history of the OWBPA, and the *McKeever* court did not acknowledge or attempt to reconcile its holding with the provisions of § 623(l)(2)(D), which implicitly sanction retiree health plans that provide different benefits depending on eligibility for Medicare. (App. at 88a.)

The remainder of Respondents' cases—*EEOC v. Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987); *Passer v. American Chemical Society*, 935 F.2d 322 (D.C. Cir. 1991); and *Caudill v. Farmland Indus., Inc.*, 698 F. Supp. 1476 (W.D. Mo. 1988)—provide no guidance as to whether the ADEA applies to retiree health benefits. None of these cases involved retirees or health benefits. Rather, all of these cases merely held that a retaliation claim could be brought by former employees. As Petitioner pointed out, while a broad reading of "employee" may have been appropriate to effectuate the purpose of anti-retaliation laws, as to the provision of health benefits, such a reading is not consistent with the express

purposes of the ADEA. (*See* Pet. at 8.) Thus, Respondents' argument that *certiorari* should not be granted because the decision below is "entirely consistent with all the prior case law" is both an overstatement of the case law and an oversimplification of the issues involved in the Question Presented.

3. Respondents contend that, because the case has been remanded to the district court to determine whether the County can satisfy the ADEA's safe harbor provision, it is premature to grant *certiorari*. Such an argument misses the point. The proceedings on remand would involve the factual determination of whether the County can satisfy the equal cost or equal benefit safe harbor. These proceedings will not, indeed could not, resolve the Question Presented. If, as Petitioner argues, the ADEA does not apply to retiree health benefits, the remand in the district court would be unnecessary and have no purpose because it would be founded upon an incorrect interpretation of the ADEA. If the County loses the remand, the County would petition the Court for review of the same Question Presented. Indeed, as pled by the Respondent, the County would lose on remand because there is no way for the County to satisfy the "equal cost or equal benefit" safe harbor provisions of the ADEA. (*See* Opp. at 6.)

CONCLUSION

The petition for a writ of certiorari should be granted.

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